89-557

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from a Three-Judge Panel of the United States District Court for the Eastern District of Louisiana

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the imposition of a desegregation remedy that restructures Louisiana's higher education system, abolishes its constitutionally authorized governance boards, creates a comprehensive community college system, establishes a hierarchical tiering system for universities, and imposes new college admission standards, among other drastic measures, unnecessarily and improperly involved the district court in higher educational policy choices;

2. Whether the district court's power to fashion a remedy below was limited by the consent decree previously entered into by the parties, and/or by the remedial standards for higher education desegregation prescribed by the U.S. Department of Education under Title VI of the 1964 Civil Rights Act;

3. Whether the racial identifiability of a State's higher educational institutions and governance boards is a sufficient basis for finding a violation of the Fourteenth Amendment or of Title VI, when the State has long ago abandoned its laws requiring racial separation in its colleges and has instituted good faith non-discriminatory hiring and admission policies and practices, and whether, in any event, the United States may raise such a Fourteenth Amendment claim; and

4. Whether the district court's rulings on the findings of the Special Master in this cause, and the district court's failure to hold hearings on Consent Decree compliance or on the merger of the Southern University Law Center into the Louisiana State University Law Center violated Due Process requirements and Federal Rules of Civil Procedure 52 and 65(d).

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IN THE

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Appellant,

v.

UNITED STATES OF AMERICA,
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On Appeal from a Three-Judge Panel of the United States District Court for the Eastern District of Louisiana

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JURISDICTIONAL STATEMENT

The Board of Supervisors of Southern University and A&M College, the appellant, appeals from the final judgment of a Three-Judge District Court entered in separate decisions:

(1) Its Order and Reasons of August 2, 1988, which held that the State of Louisiana and other defendants maintained a dual system of public higher education in violation of Title VI of the 1964 Civil Rights Act, 42 U.S.C.A. § 2000d (1981);

(2) Its Opinion and Order of July 19, 1989, which held, *inter alia*, that the system's dualism also violated the Fourteenth Amendment to the United States Constitution and which imposed a remedy; and

(3) Its Supplemental Reasons and Order of August 4, 1989, denying motions for a new trial and for a stay of

the court's prior judgment and imposing additional remedies.

OPINIONS BELOW

The August 2, 1988, judgment of the three-judge district court, which appears in the appendix hereto, p. 3a, *infra*, is reported at 692 F. Supp. 642 (E.D. La. 1988).

The July 19, 1989 and August 4, 1989, judgments are not reported and are reprinted in the appendix hereto, pp. 39a and 78a, respectively.

The final recommendations of the Special Master appointed in the proceedings below by the three-judge panel, upon which the court's judgment in part depends, is also unreported, but appears in the appendix, p. 623a, *infra*.

JURISDICTION

The final order of the three-judge court constituting the judgment herein was entered on August 4, 1989, following the district court's consideration and denial of appellant's post-trial motions.

A notice of appeal to this Court was timely filed in the United States District Court for the Eastern District of Louisiana on August 10, 1989.

This appeal is being docketed within sixty (60) days of the filing of the notice of appeal. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253. These and other statutes, rules and constitutional provisions relied upon are set forth in the appendix hereto.

HOW THE FEDERAL QUESTION WAS RAISED

The federal question was raised in the complaint of the United States, filed March 14, 1974, and amended on November 17, 1980. This action was brought pursuant to the Fourteenth Amendment to the United States Constitution; Sections 601 and 602 of the Civil Rights Act of 1964, 42 U.S.C.A. 2000d, 2000d-1, and regulations issued

thereunder, 45 C.F.R. Part 80, pp. 115a and 887a, *infra* and jurisdiction was claimed under 28 U.S.C.A. 1345. The complaint alleged, *inter alia*, that the

> . . . (A)cts and practices of the defendants and their agents maintain and perpetuate an unlawful dual system of higher education based upon race, and thereby deprive black students attending state-supported schools, and prospective black students, of equal protection of the laws and equal educational opportunities in violation of the Fourteenth Amendment to the Constitution of the United States and in violation of Title VI of the Civil Rights Act of 1964 and the regulations issued pursuant thereto.

Further, the United States prayed that the ". . . (C)ourt enter an order enjoining the defendants, their agents, officers, employees, successors, and all persons in active concert with them from maintaining and perpetuating racial dualism in the State-supported system of higher education within the State of Louisiana."

On the same date on which the original complaint was filed, the United States filed a request for a three-judge Court, under 28 U.S.C.A. §§ 2281, 2284, and Rule 12 of the United States District Court for the Middle District of Louisiana, *infra*, appendix, p. 184a. And, on March 28, 1974, an order was entered by the Chief Judge of the Fifth Circuit Court of Appeals constituting a court of three judges to hear the case, which three-judge court has been reconstituted four times since, on April 16, 1974, on November 7, 1979, on November 16, 1979, and on November 26, 1979.

In its judgment of August 2, 1988, the district court noted that a three-judge court had been properly requested and convened, p. 10a, *infra*, and ruled that the United States had standing to bring the action under Title VI, and that the twenty institutions under the four higher education boards were continuing to be operated under an unlawful, dual system of education, in violation of Title VI. Additionally, in its opinion of July 19, 1989, the

court stated that the ". . . present scheme for governing education in Louisiana—three operating boards and one coordinating board—has perpetuated illegal segregation in Louisiana's higher education . . ." and that the ". . . system of multiple boards is therefore a defect in the State's system of higher education that violates the federal constitution." Further, the court held that statistics regarding student performance ". . . demonstrate additional particular constitutional defects inherent in and perpetuated by Louisiana's present system of higher education," appendix hereto, p. 45a.

STATEMENT OF THE CASE

More than twenty years ago, on January 13, 1969, a letter was sent from the Department of Health, Education, and Welfare to the State of Louisiana, advising that Louisiana operated its system of higher education in violation of Title VI of the Civil Rights Act of 1964. This message was repeated in letters dated October 21, 1969, May 21, 1973, November 10, 1973 and November 30, 1973. Louisiana responded that its system complied with federal law. The facts set forth in these letters and the response of the State of Louisiana are the acorn from which this giant oak of a case sprouted. Through the years, like the oak from the acorn, it has grown into something quite different from its beginnings. Louisiana has changed—in particular its laws on race relations and the enfranchisement of its black citizens—and so have many of the facts giving rise to this case. The court below, and now this Court, then, are put to judge allegations now twenty years old against present day facts.

The appellant, Board of Supervisors of Southern University and Agricultural and Mechanical College, is one of three higher education management boards established by the Louisiana State Constitution of 1974, Article 8, §§ 5-7. The State Constitution also provides, in Article 8, § 5 thereof, for a coordinating or policy board, the Louisiana Board of Regents. The Constitution containing

these provisions was proposed by a bi-racial Constitutional Convention, adopted by the people of Louisiana on April 20, 1974, and cleared by the U. S. Department of Justice as comporting with the 1965 Voting Rights Act. When the people selected the multi-board higher education governance structure, they consciously chose between alternative propositions on the referendum ballot—Proposition A, for a multi-board structure; and Proposition B, for a single board, appendix hereto, p. 914a, *infra*. So adopted, the Constitution of 1974 replaced the 1921 Constitution, and became effective at midnight on December 31, 1974.

To implement its new constitutionally-mandated higher education system, the Louisiana Legislature, in an extraordinary session held in 1974, and a regular session in 1975, enacted extensive and new enabling statutes. L.S.A.-R.S. Title 17:3121-3133 and Title 17:3201-3383, appendix hereto, pp. 126a-143a and 1048a and 1067a. These statutes and other laws tied to the constitutional governance board structure became effective at various times beginning January 1, 1975.

The foregoing constitutional provisions and laws authorize the Louisiana State University (LSU) system; the State Colleges and Universities system; and the Southern University system. The Southern University system presently consists of four institutions of higher learning: (1) Southern University and Agricultural and Mechanical College at Baton Rouge; (2) Southern University at Shreveport; (3) Southern University at New Orleans; and (4) the Southern University Law Center. L.S.A.-R.S. Title 17:3216 placed the Southern University system under the authority of the Southern University Board of Supervisors. And, L.S.A.-R.S. Title 17:3335 empowered appellant and each other management board to operate as a body corporate and, within certain limited exceptions, to exercise "all power to direct, control, supervise and manage the institutions under its control," appendix hereto, pp. 126a-127a.

More than 13,000 students are currently enrolled at the institutions of the Southern University system. Each institution in the Southern system is predominantly black. The Southern University Board is predominantly black. Every other public higher education governance board in Louisiana is predominantly white. Grambling State University, governed by the Board of Trustees, is also majority black. The productive capacity of Southern and Grambling in graduating black baccalaureate degree holders in Louisiana has been singularly impressive: fifty-nine percent of the State's total number of baccalaureate degrees granted to blacks in 1985 were granted by Southern and Grambling. In 1986, that figure was sixty-two percent. National studies have ranked Southern University and A&M College in the top ten of institutions producing black college graduates in the nation, appendix hereto, pp. 947a and 1087a.

However, none of the referenced constitutional provisions or laws require any particular racial make-up of any of the State's governance boards, nor of any of its colleges.[1] The records of the Constitutional Convention disclose no racial motivation for the adoption of the Constitution of 1974, and, in particular, its higher education articles. Indeed, a black legislator proposed the creation of the Southern University Board, appendix, p. 857a, *infra*.

The Louisiana Constitution of 1974 manifests a clear break with Louisiana's segregative past. It outlaws all forms of racial discrimination in Louisiana, including in higher education. The preamble to Article 8 of the Louisiana Constitution of 1974 proclaims: "The goal of the public educational system is to provide learning en-

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[1] The State's present governor has appointed twenty-nine persons to the State's governance boards since his term of office began in March of 1988. In each case, he appointed a white person to replace a departing white and a black to replace a departing black. The racial make-up of the boards is a product of an exercise of executive discretion.

vironments and experiences, at all stages of human development, that are humane, just and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop his full potential."

Indeed, the State repealed its remaining laws requiring separate educational facilities for blacks and whites at various legislative sessions between 1972 and 1975.

Through Louisiana's new educational governance structure, as provided for in the Louisiana Constitution of 1974, each of the State's undergraduate colleges, except Louisiana State University and A&M College, is an open admissions institution. Thus, any student who graduates from a Louisiana high school is guaranteed admission to the college of his or her choice, whether the graduate is black or white. The State's graduate schools have modest selective admission standards. None of the State's governance boards created in the 1974 Constitution, particularly Southern's Board, has ever adopted any official policy or practice of denying admission to any student because of the student's race. No institution now governed by appellant has ever had any such policy at any time, however. No evidence was presented at trial to show any present-day policy or practice on the part of the State, or any governance board, or any State college, of denying any person admission to any State institution of higher learning because of that person's race. And new laws adopted by the State legislature, particularly the "Taylor Plan" legislation, guarantee a free college education to students meeting certain academic requirements regardless of race, appendix hereto, p. 144a.

The United States commenced this action on March 14, 1974, prior to the adoption of the State's present Constitution. It alleged a racially dual system of higher education in Louisiana. The United States purported to bring suit under Title VI of the 1964 Civil Rights Act as well as the Fourteenth Amendment.

The complaint was amended on November 17, 1980, to substitute defendants, and it was at this time that appel-

lant and the other governance boards created by the 1974 Constitution became parties. The defendants below, including Southern, denied liability.[2] No allegation was ever made in the initial or amended complaint that the laws authorizing the governance boards were unconstitutional or a vestige of *de jure* segregation.

On September 8, 1981, the parties settled the suit and signed a Consent Decree, appendix hereto, p. 199a. The Consent Decree was on that date entered as a judgment, following a hearing before the district court at which the court determined that the Decree was ". . . consistent with the objectives of the Fourteenth Amendment and Title VI. . .," appendix hereto, p. 200a. (See also appendix pp. 262a and 266a).

The Consent Decree provided, *inter alia*, for affirmative steps to recruit other-race students and faculty, establishing goals and timetables; for measures to reduce attrition and require developmental education; for other-race faculty fellowship programs; and for scholarships for black students pursuing medicine, law, and veterinary science at historically white institutions; for cooperative efforts between proximate, historically white and black institutions; and for the enhancement of predominantly

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[2] The parties participating in the proceedings below not listed in caption are:

(1) STATE OF LOUISIANA, Defendant Below

(2) BOARD OF TRUSTEES OF STATE COLLEGES AND UNIVERSITIES, Defendant Below

(3) BOARD OF TRUSTEES OF STATE COLLEGES AND UNIVERSITIES, Defendant Below

(4) BOARD OF SUPERVISORS OF LOUISIANA–STATE UNIVERSITY AND A&M COLLEGE, Defendant Below

(5) GRAMBLING STATE ALUMNI ASSOCIATION, Litigating Amicus

(6) LOUISIANA BOARD OF REGENTS, Defendant Below

(7) ST. BERNARD PARISH SCHOOL BOARD, Defendant Below

(8) BOSSIER PARISH SCHOOL BOARD, Defendant Below

(9) LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION, Defendant Below

black institutions, through strengthening existing academic programs, locating new high-demand, high-cost academic programs, and improving physical facilities. It provided for monitoring progress under the Decree and for reporting to the court. With respect to governance, it left the boards intact, and provided that the Regents, Trustees, and LSU Boards be desegregated to "approximately reflect the racial composition of the State's population," but that the Southern Board would "reflect the racial composition of the State's population inversely." The Southern Board's present make-up complies with this requirement.

Part III of the Consent Decree, headed "Effect of Decree" stated that it ". . . resolves all issues in contention between plaintiff and defendants in this lawsuit relating to compliance with and enforcement of the Fourteenth Amendment and Title VI." Further, Part III states in paragraph B: "The defendants' compliance with this Decree, or any modification thereof, as between the parties, shall be deemed compliance with the Fourteenth Amendment and Title VI as to all matters addressed hereunder this Decree." Appendix hereto, p. 234a.

The court retained jurisdiction to assure implementation of the Consent Decree. The court's jurisdiction, however, ended and the Consent Decree terminated on December 31, 1987, unless, the plaintiff or another party by motion "requests this Court to conduct a hearing for the purpose of determining whether the defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis." Appendix hereto, p. 235a.

On December 29, 1987, the plaintiff, the United States, filed the contemplated motion, contending that the Consent Decree had not been effectively implemented, and requesting a hearing at which such determination could be made, appendix, p. 267a, *infra*. On December 31, 1987, appellant joined in appellee's motion, p. 560a, *infra*. Yet, the court never held a hearing on these motions.

In refusing to do so, the court relied upon Part IV, Paragraph E of the decree, which states:

> Should this court determine at the time of the hearing that any provision of the Consent Decree has not been effectively implemented or that the defendants are not operating the system of public higher education in a manner consistent with the goals and objectives of this Decree, this court shall enter such orders as are necessary to provide additional or further relief as is appropriate and shall retain jurisdiction until such implementation has been accomplished. Appendix hereto, p. 236a.

The court read the words of Paragraph E "to provide additional or further relief as is appropriate" to mean that "this Court may find that the decree has failed in its purpose and thus may craft a remedy as if no decree had ever been made." 692 F.Supp. at 649, appendix hereto, p. 15a.

Finally, the Consent Decree established a compliance standard. It required the parties to make a "good faith" effort to achieve and implement its goals and commitments. Appendix hereto, p. 237a. The goals of the Decree were "not to be construed as quotas and therefore the failure to achieve any goal" would "not in itself constitute non-compliance" with the Decree. Appendix hereto, p. 237a. Parties were also permitted, where required actions were not feasible, to pursue reasonable alternatives, or, in some cases, to move for relief from the obligation. Appendix hereto, p. 237a. An Addendum to the Consent Decree and an Amendment to the Addendum were adopted by the court in September of 1982 and May of 1983, containing substantially the provisions of the principal Decree, but applying to the Shreveport, Louisiana area institutions.

Instead of determining compliance with the Consent Decree, the court, in a Minute Entry of March 30, 1988, directed the parties to file summary judgment motions on the issue of whether a racially dual system existed

in Louisiana. At the court's direction, motions for summary judgment were filed by the United States, the Board of Regents, and by the Bossier Parish School Board.

On August 2, 1988, the motion of the United States was granted and the defendants held liable for violation of Title VI. While not deciding upon a remedy, the court suggested one, then warned in its opinion that "a drastic change" might be required to remedy the remaining vestiges of the former *de jure* segregated system, i.e., the racial identifiability of the State's colleges and boards, appendix, p. 3a at 35a. The district court's suggested remedy strongly resembled political proposals offered by the State's governor, but rejected by the state legislature, appendix, pp. 834a-853a. The governor offered these proposals, not for desegregation purposes, but rather, for "reform purposes," appendix, pp. 1001a-1022a.

On October 19, 1988, appellant filed a motion for an evidentiary hearing and reurged its demand for a determination of Consent Decree compliance, appendix, p. 569a. The district court denied the motion and required the parties to fashion a remedy acceptable to the court, appendix, pp. 577a and 579a.

The parties tried unsuccessfully to reach accord on a voluntary remedial plan. Thereafter, on December 2, 1988, the court appointed a Special Master to develop a plan. The Special Master entered his "Recommended Remedial Plan" on April 18, 1989. On May 30, 1989, the Special Master submitted to the court his "Final Report" embodying his suggested remedy to desegregate Louisiana's higher education system, which remedy tracked that suggested by the court in its August 2 Opinion.

Appellant and other parties below, particularly appellee herein, filed extensive objections to the Special Master's initial and final recommendations. Appendix hereto, pp. 582a-617a and 721a-733a. Nonetheless, the district court issued a judgment on July 19, 1989, adopting most of the recommendations of the Special Master.

As presaged by the court, the remedy it ordered was drastic indeed. For the first time, the court declared Louisiana's governance structure and its higher education system unconstitutional, based on the Fourteenth Amendment. It required that within thirty days of the entry of its order "the four boards currently governing public higher education in Louisiana shall be disbanded and their powers consolidated into a single State governing board." The court gave this new board "ultimate authority over academic, budgetary, personnel and administrative affairs of each public institution currently overseen by the Board of Trustees, the Southern Supervisors, and the LSU Supervisors." Appendix hereto, p. 63a. The court also gave the board the special mission of monitoring and implementing the court's remedial plan and of insuring progress toward eliminating Louisiana's racially dual system.

The court set the size of this judicially created board at seventeen members, plus one non-voting student member; fixed the term of office of its members; established the appointing authority; provided for staggered terms; set certain qualifications for board members; reserved to itself the right to appoint members to the board, under certain circumstances, and, in any event, to veto its composition or any appointee thereto; empowered the board to appoint a president and an interim president to run the system and called for a substantial administrative staff whose qualifications it also set; and mandated advisory boards for each college, appendix hereto, pp. 63a-66a. In setting up the board, the court rejected a finding of the Special Master that a specific racial makeup of the board, seven black members out of seventeen, was necessary to protect the interests of historically black colleges and black students. Appendix hereto, p. 53a.

The district court structured the State's colleges into a hierarchical tier, establishing a flagship/research university, several doctoral and graduate program institutions, and comprehensive institutions. With respect to

each tier, the court prescribed selective or open admission standards. For the new selective institutions, the court provided for a rule of ten percent admissions exceptions for other-race students, principally because of its concern for the negative effect selective admissions might have on black students. Indeed, the court decreed an end to the traditional system of open admissions to all State universities, in effect, limiting present student choice and set deadlines for the adoption of new admission standards. It also limited the availability of remedial education programs in the State's four-year colleges, which programs principally assist in the college education of black students. Appendix hereto, pp. 56a, 67a and 71a.

The district court also ordered the establishment of a new comprehensive community college system, beginning with the State's four existing two-year institutions, and its vocational schools, and then expanding into other areas of the State with the creation of new community colleges. It set the requirement for the system's administrative head and for his qualifications and mandated admission standards.[3] Appendix hereto pp. 70a-71a.

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[3] These remedies are less than obvious desegregation tools. Mr. Justice Holmes has stated in another context, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S.Ct. 506, 507 (1921). Here, literally volumes of history show the irrelevance of the district court's remedies to desegregation. For instance, Florida has had a single governance board since 1905 (Florida Statutes, Title 16, Section 240.205; Florida State Constitution, Article 9, Section 1); Georgia, since 1931 (Georgia State Constitution, Article 8, § 4); and Mississippi, since 1910 (Mississippi Statutes, 37-101-3, et seq.; Mississippi Constitution, Article 8, § 2134, et seq.) Yet each was charged by HEW and/or the U.S. Department of Justice with Title VI violations, as was Louisiana, a multi-board state. What these states historically had in common was not their governance structures, but their official policies and practices of racial discrimination. No state has ever adopted a single governance structure as a desegregation remedy, nor selective admissions, nor a community college system; and the United States did not seek nor support this remedy here. Compare *Milliken v. Bradley*, 433 U.S. 289, 297, 97 S.Ct. 2749, 2757-2758 (1977) (Milliken II) (requiring remedies to be related to desegregation).

Although the Southern University Law Center is admittedly integrated—with a student body that is 58 percent black and 42 percent white, and a faculty that is 50 percent black and 50 percent white—the court ordered its elimination and merger into the LSU Law Center, where less than one percent of the student body is black. The court justified this order on the grounds that: (1) the merger would eliminate program duplication, a claimed impediment to desegregation, and (2) the percentage of Southern graduates who passed the state bar examination on their first attempt demonstrated that Southern's was an "inferior law school," producing "a secondary class of lawyers unable to compete fully in the professional context." No evidence was adduced at trial to support these conclusions or this merger. No notice or opportunity for a hearing was given to the parties of the court's intention in this regard. The Special Master specifically recommended against merger of the law centers or any other institutions.

The court ordered funding to improve the quality of the State's predominantly black universities, but only "whenever fiscally possible", a standard left undefined. And it required its newly created board to develop a program of "financial incentives" for institutions meeting or exceeding board-established desegregation goals, and "reverse incentives or taxes" for those consistently failing to meet their goals. Appendix hereto, p. 75a.

The court established a monitoring committee to evaluate the progress of the new board and of each institution toward "specific compliance" with its Order. The court also appointed members to the specific monitoring board, including a Dr. Paul Murrill, a former Chancellor of LSU and A&M College. The court cloaked the monitoring committee with authority to recommend appointees to the governance board in certain cases. The court ordered that if the governance board did not "achieve substantial progress toward eliminating the racial identifiability of Louisiana's universities" within five years, then the moni-

toring committee was mandated "to recommend to the court more direct solutions, including court appointment of board members or direct control by the committee of the system of higher education and merger of institutions." Neither the term "substantial progress" nor "racial identifiability" were defined in this context. However, the court retained "continuing jurisdiction to take appropriate action" to enforce its Order. Appendix hereto, pp. 76a and 77a.

On July 31, 1989, appellant, the Grambling State University Alumni Association, and appellee filed post-trial motions variously for a new trial, to amend or alter judgment, or to have the court's judgment reconsidered, appendix hereto, pp. 734a, 779a, and 785a. Additionally, appellant filed a motion to stay the district court's judgment. On August 2, 1989, the State of Louisiana, through its Attorney General, joined in appellant's motions. On August 4, the district court denied the motion to stay, and issued a "Supplemental Order," granting in part and denying in part the post-trial motions of the several parties in an effort "to obviate any ambiguity or uncertainty" contained in its Judgment of July 19, 1989. Its August 4 Order provided measures to desegregate institutional staffs and administrators. It ordered the State's four governance boards to "cease operation . . . no later than thirty (30) days from entry of the court's Order of July 19"; and limited the period of the effect of its Order to December 1994, appendix hereto, pp. 105a-108a.

On August 18, 1989, this Court granted appellant's and the State of Louisiana's applications for a stay of the enforcement of the district court's judgment in this matter pending the timely docketing of this appeal and the final disposition of this case, appendix hereto, p. 2a.

THE QUESTIONS ARE SUBSTANTIAL

The appropriate standards for crafting a desegregation remedy in the context of a higher education case, brought under the Fourteenth Amendment and Title VI, presents

a novel and substantial question. It has never been addressed by this Court.

Appellant asserts that the controlling remedial standards are embodied in the Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658 (February 15, 1978). The Criteria were promulgated by the then Department of Health, Education and Welfare (HEW), and are now administered by the Department of Education. Thus, they represent the agency's interpretation of Title VI compliance standards, as Congress has specifically required the agency to interpret the laws its administers. The agency's interpretation of this law is a duty reposed to the agency by Congress and is binding upon courts, according to recent Supreme Court cases. *NLRB v. United Food and Commercial Workers Union, Local 23, AFL-CIO*, —— U.S. ——, 108 S. Ct. 426 (1987); *Young v. Community Nutrition Institute*, 476 U.S. 974, 106 S.Ct. 2360 (1986); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778 (1984); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 100 S.Ct. 790 (1980); *Batterton v. Francis*, 432 U.S. 416, 425-26, 97 S.Ct. 2399 (1977). *See also Adams v. Bell*, 711 F.2d 161, 165 n.28, 29 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1065, 104 S.Ct. 1272 (1984); *Adams v. Califano*, 430 F. Supp. 118 (D.D.C. 1977) (Order, 430 F. Supp. at 121). *See also Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), *modified and aff'd per curiam*, 480 F.2d 1159, 1164-1167 (D.C. Cir. 1973).

Similarly, in *Singleton v. Jackson Municipal Separate School District*, 348 F.2d 729 (5th Cir. 1965), the Fifth Circuit ordered the district court to apply HEW Criteria developed for elementary and secondary schools. The appeals court recognized that, in enacting Title VI and in requiring such promulgations, Congress intended a uniform national policy in desegregation cases, and enforcement of that policy by a national agency under nationally

applicable guidelines. *See also United States v. Jefferson County Bd. of Ed.*, 372 F.2d 836 (5th Cir. 1966) *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 386 U.S. 1001 (1967); *Price v. Denison Indepedent School District Bd. of Ed.*, 348 F.2d 1010, 1015 (5th Cir. 1965); K. Saunders, *Agency Interpretations and Judicial Review: A Search for Limitations on the Controlling Effect Given Agency Statutory Constructions*, 30 Ariz. L. Rev. 769, 770, 800 (1988).

In the instant case, the district court held that the Criteria applied "only during the voluntary compliance period" and were "not intended to be applied by courts adjudicating Title VI violations," appendix, p. 85a. Thus, it refused to accord the Criteria any weight whatsoever.

This Court should decide whether there will be uniform national legal standards regarding higher education desegregation remedies, or ad hoc district by district court articulation of such standards to enforce Title VI. Uniform enforcement of the Equal Protection Clause throughout the United States is one of the chief benefits of Title VI. Therefore, Title VI compliance requirements should not differ from state to state nor should they differ depending upon whether compliance is voluntary or not.

The district court's remedy strikes down provisions of Louisiana's Constitution of 1974 and the numerous State laws that implemented them; eliminates a productive, historically black professional school; and re-writes, as would a legislature, broad new chapters of higher education law for the State. In contrast, the Criteria provide a far less intrusive remedy.

Even without reference to the court's disregard of the Criteria, the sweeping remedial scheme it fashioned was overly broad, presenting a substantial federal question. The district court was required to narrowly tailor its remedy to fit the violation of rights involved. It would be justified in striking Louisiana's laws as unconstitutional only where it was necessary to do so to cure the violation. The

least intrustive remedy was required to be employed. *City of Richmond v. J. A. Crossen Company*, —— U.S. ——, 109 S. Ct. 706 (1989); *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 99 S.Ct. 2766 (1978); *Milliken v. Bradley*, 418 U.S. 717, 744, 94 S.Ct. 3112, 3127 (1974) (Milliken I); *Whitcomb v. Chavis*, 403 U.S. 124, 160-161, 91 S.Ct. 1858, 1877-78 (1971); *Swann v. Charlotte Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276 (1971); *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 434 (1976); and *Rizzo v. Goode*, 423 U.S. 362, 377 (1976); *Columbus Bd. of Ed. v. Penick*, 439 U.S. 1348, 1353, 99 S.Ct. 24, 26-27 (1978). *See also Sixty-Seven Minnesota State Senate v. Beens*, 406 U.S. 187, 92 S.Ct. 1477 (1972) (A federal reapportionment court should accommodate the relief ordered to the appropriate provisions of State statutes relating to the legislature's size as far as possible; drastically changing the size of the State senate and the size of the house of representatives of the legislature is not required by the federal Constitution and is not justified as an exercise of federal power). *Cf.* Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4, 49 (1982). This is particularly true in education cases, where the Supreme Court has shown increasing reluctance to allow federal courts to trench on the prerogatives of State and local educational institutions, but instead leaves public education, insofar as constitutionally possible, under the control of state and local authorities. *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226, 106 S.Ct. 507, 513 (1985); *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449, 465 (1979); *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 90 (1978); *Keyes v. School District No. 1 Denver, Colo.*, 413 U.S. 189, 213 (1973); *Alabama State Teachers Association (ASTA) v. Alabama Public School and College Authority*, 289 F. Supp. 784, 788 (M.D. Ala. 1968) (Three-Judge Court), *aff'd per curiam, without written opinion*, 393 U.S. 400, 89 S. Ct. 68 (1969); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

In the instant case, the district court could have attacked the offending "racial identifiability" it found in the governance boards by specific orders requiring a given racial make-up, and specific orders respecting attracting other-race faculty and students, leaving to state authorities the details of bringing the state into compliance, if a valid constitutional violation were found. *Ruiz v. Estelle*, 650 F.2d 555 (5th Cir. 1981), *cert. denied*, 460 U.S. 1042 (1983). Thus, there is no geometric fit between the remedy of a single board or the other restructuring ordered and the claimed violation of racially identifiable boards and institutions.

Speculation by the Special Master, later adopted by the court, that under a single board funds would be "freed up . . . presumably to aid in the desegregation process"; that it is "sensible that efficient decisions [of a single board] might aid in desegregation"; and that while the "improvement" in desegregation in Florida under a single board is a "predictive" . . . "but by no means implausible" judgment for Louisiana, is too weak a support to dismantle a system of governance, admissions, and organization adopted fourteen years ago, subsequent to the *de jure* segregative actions of the State. Appendix hereto, p. 658a.

Application of the Criteria or the prevailing jurisprudence to this case would not have required or permitted the elimination of the Southern University Law School. The Criteria declare a "unique role" for "traditionally black colleges." They command that historically "white and black institutions are to function as part of a unitary system free of the vestiges of state-imposed racial segregation" appendix hereto, pp. 871a, 873a. To disestablish the dual structure, the Criteria require a given State or agency to "specify steps to be taken to strengthen the role of traditionally black institutions in the state system."[4] As a desegregation goal, the Criteria seek more

[4] As to the unique role of historically black colleges in the education of the historical victims of discrimination, see Brief of

and better-trained minority group doctors, lawyers, engineers, and other professionals.

The court-ordered merger jeopardizes Southern's proven capacity to produce qualified black lawyers in return for the uncertain prospect of a judicially perceived greater quality institution. Besides, the court's reasoning is a *non sequitur*. Law graduates who do not pass the bar do not become attorneys. If bar passage is the standard of quality, then, can Southern law graduates who pass the bar be denominated a secondary class? Must they not be presumed equal in competence to other lawyers who pass the bar? Are they not, therefore, fully able to compete in the professional context? To condemn those Southern graduates who become attorneys simply because they graduated from Southern is to ask, as Nathaniel did of Philip respecting Jesus Christ; "Can anything good come out of Nazareth?"—an unfounded and unreasonable

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Amicus, National Association for Equal Opportunity in Higher Education, filed and referenced in *Adams v. Richardson*, 480 F.2d 1159, 1164-1165 (D.C. Cir. 1973), appendix, pp. 975a-984a. The brief argues, *inter alia*, that equal educational attainment—achieving college degrees—not just equal access, is a goal of Title VI and the Fourteenth Amendment. See also "Statement by the National Association for Equal Opportunity in Higher Education," appendix, pp. 976a, 985a-987a.

In *Adams*, the court stated:

> The problem of integrating higher education must be dealt with on a state-wide rather than a school-by-school basis. Perhaps the most serious problem in the area is the lack of statewide planning to provide more and better trained minority group doctors, lawyers, engineers and other professionals. A predicate for minority access to quality post graduate programs is a viable, coordinated statewide higher education policy that takes into account the special problems of minority students and of black colleges. As Amicus points out, these black institutions currently fulfill a crucial need and will continue to play an important role in black higher education.

question, then and now.[5] The Criteria suggest that improving the quality of the already desegregated historically black law school, if indeed necessary, would more effectively assist black citizens to overcome the effects of *de jure* segregation, one of which is a paucity of black lawyers.[6]

The Southern Law Center was *sua sponte* ordered closed without a hearing and without regard to proper legal standards, in violation of the procedural and substantive due process rights of appellant and of the law center's faculty and students. *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 2532 (1985); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Cf. Dartmouth College v. Woodward*, 4 Wheat 512 (1819). "Audi alteram partem—hear the other side!—a demand made insistently through the centuries, is now a command spoken with the voice of the Due Process Clause." *Caritativo v. California*, 357 U.S. 549, 558 (1958) (Frankfurter, J., dissenting). *Earl v. McVeigh*, 91 U.S. 503, 510 (1876). This is a principle of universal obligation. See also Baier, *Framing and Reviewing a Desegregation Decree: Of the Chancellor's Foot and Fifth Circuit Control*, 47 La. L. Rev. 123, 138 (1986).

The district court's finding of a constitutional infirmity because the State maintains in the same city two

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[5] See John 1:46

> "And Nathaniel said to him, can anything good come out of Nazareth? Philip said to him, come and see."

Only a court that indulges the notion espoused by certain parties to this cause that a predominantly black law center is necessarily inferior could, on the basis of such a fleeting glimpse at the Southern Law Center as the court below had in this case, confirm its inferiority. As with Philip, the district court was required to "come and see" in the form of a hearing and supporting record, to avoid making, as here, an uniformed judgment.

[6] Virtually all of Southern's law graduates pass the bar exam, although not on the first attempt, appendix, p. 860a.

law schools with different admission standards and different orientations is not supported on the record, and is an impermissible tampering with the State's valid educational choices.[7]

The Criteria also recognize, and the Special Master specifically found below, that the enhancement of predominantly black institutions (PBIs) is an essential ingredient of a plan to desegregate higher education. In the light of a clear record, the Special Master ordered that a percentage of the State's operating and capital budgets be set aside each year to enhance PBIs. Under Rule 52 of the Federal Rules of Civil Procedure, this finding should have been implemented by the court since it was not "clearly erroneous." This reasoning also applies to the Special Master's finding that merger of the Southern Law Center into the LSU Law Center was not justified on the record. *See Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199 (6th Cir. 1984); *NLRB v. Southwestern Bell Telephone Co.*, 730 F.2d 166, 168 (5th Cir. 1984); *See also Criteria*, I(B), appendix hereto, p. 875a. The vague and unclear order of the court to provide enhancement funding whenever fiscally possible, violates both the specificity requirements of Fed. R. Civ. P. 65(d), and the well-stated rule that a State's fiscal posture may not be taken into account in fashioning a desegregation remedy. *See, Liddell v. Missouri*, 731 F.2d 1294, 1320 (8th Cir. 1984), *cert. denied*, 469 U.S. 816,

[7] Indeed, the record argues otherwise. Two distinguished law school deans, Peter Hay, Associate Dean of the University of Illinois School of Law, and Charles Meyers, Dean of Standford Law School, visited Louisiana law schools, including Southern University Law Center, and rendered a report to the State Board of Regents on legal education in Louisiana. This Report was attached to Chancellor B. K. Agnihotri's witness statement submitted to the Special Master which was before the district court. See appendix, *infra*, pp. 1030a-1038a. These distinguished legal educators concluded that: "[I]t is essential for the well-being of all the people of Louisiana, not just the blacks, for Southern University Law School to remain in existence and to grow in size and strength." Appendix, *infra* pp. 1044a-1045a and 1047a.

105 S.Ct. 82 (1984); *Atiyeh v. Capps*, 449 U.S. 1312, 101 S.Ct. 829 (1981); and *Williams v. Edwards*, 547 F.2d 1206, 1213 (5th Cir. 1977), presenting other substantial federal questions. Further, the district court's failure to specifically limit the term of its continuing jurisdiction, and the basis on which it is empowered to act to fashion new or additional remedies; as well as the failure to define the terms "substantial progress" and "racial identifiability," also violate Fed. R. Civ. P. 65(d).

Similarly, the court below condemned the Consent Decree—the parties' voluntary settlement of their dispute, and their voluntary acceptance of a remedy—without a hearing, even though a hearing was mandated by the Consent Decree itself. The court simply eye-balled the racial make-up of the colleges and boards—a test not permitted by the terms of the Decree—and concluded that the Decree had not and could not work, appendix hereto, pp. 34a-35a. It also made unsubstantiated and incorrect findings related to Consent Decree implementation, appendix hereto, pp. 35a, 572a-573a. The remedy imposed by the district court's judgment was thus unnecessary, overriding the existing final judgment on remedy already entered in the case. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 590-591, 104 S.Ct. 2576, 2594-2595 (1984); *United States v. Swift & Co.*, 286 U.S. 106, 115-117, 52 S.Ct. 460, 462-463 (1932).

The Decree operated as a judgment, whether a predicate violation of Title VI or the Fourteenth Amendment existed, or whether its remedies were broader than legally required. *Local Number 93, International Association of Firefighters v. City of Cleveland*, 54 U.S.L.W. 5005, 5009-5010 (U.S. July 2, 1986). Since the scope of a consent decree must be discerned within its four corners, the district court clearly exceeded its jurisdiction when it considered the question of liability under Title VI and the Fourteenth Amendment, and when it fashioned an entirely new remedy. *United States v. Armour & Co.*, 402 U.S. 673, 682, 91 S.Ct. 1752, 1757 (1971); *United States*

v. Atlantic Refining Co., 360 U.S. 19, 23, 79 S.Ct. 944, 946 (1959); and *Hughes v. United States*, 342 U.S. 353, 72 S.Ct. 306 (1952).

The district court's strained reasoning that it had authority under the cited language of the Consent Decree to "provide additional or further relief as appropriate," disregards the obvious requirement that such a determination must be made "at the time of the hearing" on Consent Decree compliance, pp. 12a-13a, *supra*, a hearing that was never held. Even then, the Consent Decree allows "additional or further relief as appropriate" only to the extent necessary to insure its effective implementation.

No party argued, as the district court suggests, that merely signing the Consent Decree rendered the State's system unitary, appendix hereto, p. 15a. But since the Decree had been entered as a judgment consistent with Title VI and the Fourteenth Amendment, a determination of compliance or not with its provisions was necessarily the same as determining whether the system was unitary. The court's assertion that it could not enforce Consent Decree-required remedies at a hearing held after the December 31, 1987 termination date of the Decree, even though the enforcement process of requesting a hearing began prior to the termination date, is nonsensical. Appendix, pp. 15a-16a. Its reliance on *United States v. Overton*, 834 F.2d 1171, 1174, 1176 (5th Cir. 1987), is erroneous. In *Overton*, the parties' Consent Decree (or stipulated agreement), unlike in the instant case, had terminated before relief under it was sought. Understandably, the *Overton* court could not enforce a decree that had expired by its own terms. Here, the plaintiff's motion was timely filed, thus, in accordance with the express provisions of the Consent Decree, extending its life and making its remedies enforceable at a compliance hearing, appendix hereto, pp. 235a and 236a.

Although a final judgment, a consent decree must be construed as a contract for enforcement purposes. *United*

States v. ITT Continental Baking Co., 420 U.S. 223, 238, 95 S.Ct. 926, 935 (1975). Thus, the district court lacked the power to enter a new remedy, but could only enforce the Decree by its terms. By its clear provisions, the Consent Decree permitted the existence of both racially identifiable boards and institutions at the end of its term, as long as the parties discharged their obligations in good faith, pp. 202a and 237a, *supra*. The court's disregard of the Consent Decree thwarts a national policy favoring voluntary resolution of Title VI claims, and discourages settlement of desegregation cases—matters worthy of consideration by this Court.

Even if the court would apply the Criteria to voluntary compliance only, as the court below asserts, the Consent Decree obviously represents voluntary compliance by the parties. Therefore, the Criteria should have been applied to this case for this further reason.

Additionally, the court's requirements of selective admissions, of a community college system, of reverse incentives for institutions failing to meet desegregation goals, and of eliminating remedial education in senior colleges, place disproportionate burdens on black students and black institutions, in violation of the Criteria and relevant jurisprudence.[8] The Criteria declare that the

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[8] See *Adams v. Richardson*, 480 F. Supp. 118 (D.D.C. 1977), where the court stated:

> The process of desegregation must not place a greater burden on black institutions or black students' opportunity to receive a quality public higher education. The desegregation process should take into account the unequal status of black colleges, and the real danger that desegregation will diminish higher educational opportunities for Blacks. Without suggesting the answer to this complex problem, it is the responsibility of HEW to devise criteria for higher education desegregation plans which will take into account the unique importance of black colleges and at the same time comply with the congressional mandate. *Cf. Mayor and City Council of Baltimore v. Matthews*, 562 F.2d 914, 922 and n.7 (4th Cir. 1977); and *Mandel v. U.S. Dept. of HEW*, 411 F.Supp. 542 (D.C. Md. 1976).

"transition to a unitary system must not be accomplished by placing a disproportionate burden upon black students, faculty or institutions or by reducing the educational opportunities currently available to blacks," appendix hereto, p. 837a. Selective admissions, particularly the unrestrained use of ACT scores which the district court permits, will unduly limit the number of black students attending college. Apparently recognizing this fact, the court ordered the institutions to reserve up to ten percent of admissions as "exceptions." But these exceptions themselves will introduce new burdens for black students, labeling them as second class students.

The requirement of incentives and reverse incentives to reward and to penalize institutions for progress in achieving desegregation goals overlooks the obvious fact that historically black colleges can be expected to make slower progress. The result will be that these schools, which need more resources to desegregate, will get less; and getting less they will be less successful in achieving integration. The court's threat of merger of racially identifiable colleges at the end of the five year term of the court's order is, therefore, an ominous one—portending the elimination of historically black colleges and their productive capacity. And, contrary to the district court's conclusion, community colleges in the State of Florida have increased burdens rather than opportunities for minority students in higher education, appendix hereto, pp. 916a-919a and 957a-974a.

In *ASTA*, *supra*, a three-judge court held that where a State has eliminated *de jure* racial segregation, as long as the State or its institutions deal with admissions, faculty and staff in good faith, it discharges its affirmative duty to dismantle the racially dual system on the college level. 289 F. Supp. at 790. The Supreme Court's *per curiam* affirmance in *ASTA*, 393 U.S. 400, 89 S.Ct. 681 (1969) was a decision on the merits necessarily deciding the *ASTA* holding and was, therefore, binding on the district court. *See Hopfmann v. Connolly*, 471 U.S. 459, 105 S.Ct.

2106 (1985); *Anderson v. Celebrezze*, 460 U.S. 780, 784, 103 S.Ct. 1564, 1568, n. 5 (1983); *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240 (1977). The district court declined to follow this precedent. *Cf. Ayers v. Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987) *appeal pending appeal docketed No. 88-4103* (5th Cir. argued May 1, 1989); *Hicks v. Miranda*, 422 U.S. 332, 344, 95 S.Ct. 2281, 2289 (1975).

ASTA correctly recognizes that a State cannot assign students to colleges as it can assign them to elementary schools; a State, therefore, cannot be forced by a court judgment to do something it has no power to do. Hence, the relative degree of integration of its colleges, without more, does not determine whether the state has satisfied its affirmative duty to dismantle a dual system.

The Sixth Circuit in *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986) appears to reach a result opposite to that of *Ayers* and *ASTA*, but in erroneous reliance on the Supreme Court's summary affirmance in *Norris v. State Council of Higher Education for Va.*, 327 F.Supp. 1368 (E.D. Va. 1971), *aff'd per curiam sub. nom., Board of Visitors of the College of William & Mary in Virginia v. Norris*, 404 U.S. 907, 92 S.Ct. 227 (1971). The *Norris* court, unlike the court in *ASTA*, declined to "trace the perimeter of a state's obligation to dismantle all racial characteristics of a system of higher education that was initially segregated by law." *Norris'* holding, far from reaching this monumental question, held simply "that one agency of the state . . . cannot impede another agency of the state . . . in its efforts to fully integrate its student body." 327 F.Supp. at 1373. Thus, *Norris'* precedential value is limited to that simple holding. The court below misconstrued the *Norris* holding and incorrectly followed it.[9]

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[9] The hope expressed in *Green v. County School Board of New Kent County*, 391 U.S. 430, 432, 88 S.Ct. 1689 (1968), for no white or black elementary and secondary schools, "just schools," and the dictum in *Norris*, 1327 F. Supp. 1373 for "just colleges,"

Even if *ASTA* does not state the controlling law, as appellant believes, then *ASTA* and *Ayers*, on the one hand, and *Norris* and *Geier* on the other, present a conflict between lower courts and the circuits on this most substantial national issue.

Further, the actions that the State agreed to undertake and those that it did undertake under the Consent Decree must be deemed affirmative steps to dismantle the dual system, to the extent that such are demanded by the good faith requirement. The United States and appellant have argued below that incomparable physical facilities at PBIs indirectly exclude certain white students and affect their free choice, and disproportionately burden the choices of black students who choose to attend PBIs. Thus, a part of the good faith test, consistent with *ASTA*'s rule of unfettered student choice, is the removal of any impediments to such choice lingering from the dual system. A state may address this problem through added resources or other action designed to improve the integration and offerings of PBIs. The emphasis here is not on "separate, but equal", as the district court incorrectly observed, since no racial separation is legally required; it is rather on ending racial separation through enhancement, appendix hereto, p. 33a. Appellant believes this is a reasonable reading of *ASTA*'s good faith standard, or at the very least, can be en-

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do not necessarily argue that majority black public colleges offend the Constitution. Appellant's hope is that availing black and white students of equal access and opportunity in the settings of hisorically white and black colleges will permit colleges such as are managed by appellant to be recognized as "just colleges"—not predominantly black or formerly all black—within the letter and spirit of *Green, supra*.

Indeed, the Criteria commit States to the "goal of organizing and operating the system and institutions of higher education in a manner that promises realistically to overcome the effects of past discrimination and to disestablish the dual system, and *which assures that students will be attracted to each institution on the basis of educational programs and opportunities uninhibited by past practices of segregation.*" (Emphasis added.)

grafted upon the *ASTA* standard without derogating from it—presenting another important and unresolved federal question.[10]

The great weight of authority holds that the United States may not maintain a claim strictly under the Fourteenth Amendment. Yet, the district court permitted the United States to do so and struck down Louisiana's constitution and laws as violative of the Fourteenth Amendment, raising an additional substantial question. *United States v. State of Alabama*, 828 F.2d 1532, 1547 (11th Cir. 1987) (*per curiam*) (The United States conceded that it had no standing to raise the Fourteenth Amendment claim.), *cert. denied, sub. nom. Board of Trustees of Alabama State University v. Auburn*, —— U.S. ——, 108 S.Ct. 1857 (1988); *United States v. City of Philadelphia*, 644 F.2d 187 (3rd Cir. 1980); *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979); *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977). Although this Court has not ruled directly on this issue, based on the uniform authority of the various circuits, only Title VI claims were before the district court. Whether appellee could raise Fourteenth Amendment claims is critical. The district court's expansive remedy is grounded in constitutional violations, testing the limits of its equitable powers. Title VI provides a more limited remedy, and the court could not strike Louisiana's laws as unconstitutional if appellee could not raise constitutional claims. A decision on Title VI grounds is distinct from an exercise in constitutional interpretation. *Regents of the University of California v. Bakke*, 438 U.S. 265, 281, 98 S.Ct.

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[10] For instance, just to bring the physical facilities of Grambling and Southern to a level of comparability with agreed upon historically white institutions, the State committed during the term of the Consent Decree to spend $79 million in capital outlay at Southern and $41 million at Grambling. However, it spent only $14 million at Southern and $16 million at Grambling in capital outlay funds during this period. These disparities and the failure to fund them are admitted on the record and must be dealt with in order to afford a truly free choice to students, appendix hereto, p. 364a.

2733, 2743 (1978). *Cf. U.S. v. State of Alabama*, 791 F.2d 1450, 1456 n. 6 (11th Cir. 1986). Thus, the district court's findings of unconstitutionality of Louisiana's laws is *ultra vires*.

Furthermore, the district court should have decided the case on statutory grounds or on the basis of the Criteria, and avoided the constitutional question. Under well-settled principles of judicial restraint articulated by this Court, it was required to do so. *Three Affiliated Tribes of Ft. Bertole Reservation v. Wold Engineering*, 467 U.S. 138, 104 S. Ct. 2267 (1984); *Regents of the University of California v. Bakke*, 438 U.S. 265, 281, 98 S.Ct. 2733, 2743 (1978); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 65 S.Ct. 152 (1944); and *Ashwander v. T.V.A.*, 297 U.S. 288, 347, 56 S.Ct. 466, 483 (1936).

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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89-557

Nos. 89-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF LOUISIANA, *ex rel.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee.

AND

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee.

On Appeal from a Three-Judge Panel of the United States District Court for the Eastern District of Louisiana

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JOINT APPENDIX TO JURISDICTIONAL STATEMENT

(Volume I, pp. 1a-532a)

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APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. A-126 and A-127

SOUTHERN UNIVERSITY BOARD OF SUPERVISORS,
Applicants,

v.

UNITED STATES, *et al.*

and

LOUISIANA, *ex rel.*, WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL OF LOUISIANA,
Applicant

v.

UNITED STATES, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that enforcement of the judgment and orders of the United States District Court for the Eastern District of Louisiana, Civil Action No. 80-3300, entered on August 2, 1988, July 19, 1989 and August 4, 1989, be, and the same are, hereby stayed pending receipt of responses to the applications and further order of the Court.

/s/ Byron R. White
Associate Justice of the
Supreme Court of the
United States

Dated: August 14, 1989

ORDER LIST

Friday, August 18, 1989

ORDER IN PENDING CASE

A-126

SOUTHERN UNIVERSITY BOARD OF SUPERVISORS

v.

UNITED STATES, *et al.*

A-127

LOUISIANA, *ex rel.* WILLIAM J. GUSTE, JR.,
ATTORNEY GENERAL OF LOUISIANA

v.

UNITED STATES, *et al.*

The applications for stay presented to Justice White and by him referred to the Court are granted and enforcement of the judgment and orders of the United States District Court for the Eastern District Court of Louisiana, Civil Action No. 80-3300, entered August 2, 1988, July 19, 1989 and August 4, 1989, is stayed pending the timely docketing of appeals in these cases and final disposition by the Court.

Justice Brennan, Justice Marshall and Justice Blackmun dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

Order and Reasons

[Filed August 2, 1988]

Before WISDOM, Circuit Judge, and SCHWARTZ and WICKER, District Judges.

SCHWARTZ, J.

This matter is before the Court on cross-motions for summary judgment on the issue of liability. For the following reason, the Court now GRANTS IN PART AND DENIES IN PART plaintiff's motion, GRANTS motions of defendants Bossier Parish School Board and BESE, and DENIES all other defendants' motions.

This is a college discrimination suit. Alleging that Louisiana had been maintaining a dual system of public higher education on the basis of race in violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, the United States commenced this suit in March 1974 against the State of Louisiana and its various State boards that oversee the State's public institutions of higher learning. In September 1981, the Court

approved a consent judgment. In December 1987, the United States moved pursuant to certain terms in the decree for hearing to determine whether defendants have fully implemented all provisions of the decree and are operating a unitary system of public higher education. The Court has set the trial (both for this issue of liability and, if liability is found, for the issue of remedy) for September 1988.

Each side asserting that no trial is needed on the issue of liability, both sides now cross-move for summary judgment on this issue. All agree that the state operated a *de jure* segregated system of public higher education prior to the enactment of Title VI and has not implemented *all* provisions of the 1981 decree and that most all of the State's public institutions of higher learning remain racially identifiable; beyond this, however, the parties disagree. On the one hand, the United States, along with the predominantly black institutions, argues that unlawful vestiges of State's former *de jure* segregated system will remain unless the State spends the additional money contemplated under the decree. On the other hand, the State argues that the full implementation of the decree provisions would actually promote segregation and that the State has implemented sufficient good faith efforts at ending the dual system so as to warrant a dismissal of the entire case.

For the instant motions, the parties have submitted hundreds of pages of briefs and exhibits. Unfortunately, the parties have concentrated the vast bulk of their efforts on the issue of remedy and on an improper standard of liability. As explained below, the Court finds, except as to the Bossier Parish Community College and the St. Bernard Parish Community College, that Louisiana is continuing to operate an unlawful, dual system of public higher education in violation of Title VI.

I.

A.

The material facts for the issue of liability are not in dispute. Up to at least 1954, Louisiana had a system of higher education segregated by race under state law. Not until some time after the enactment of the Civil Rights Act of 1964 did Louisiana discontinue its official recognition of its institutions of higher education as being either for "whites" or for "blacks." The present admissions policies to all of Louisiana's public institutions of higher education no longer discriminate on the basis of race or otherwise; any Louisiana citizen who has graduated high school may attend the Louisiana public college of his choice, regardless of the person's academic qualifications. All parties agree that "[p]ublicly financed higher education in Louisiana is paid for primarily with state and federal funds" and that Louisiana's state-supported colleges and universities have and continue to receive federal funds.

Louisiana has twenty institutions [1] of higher education each of which is under the supervision of the Board of Regents and one of the three other higher education boards. The four institutions that were originally established as "black" schools (Southern University-Baton Rouge, Southern University-New Orleans, Southern University-Shreveport/Bossier City, and Grambling State University) [2] remain predominantly black. The eleven

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[1] Plaintiff suggests that there are only eleven institutions; it characterizes the eights schools within the LSU system and the three schools within the Southern University system as being just two "institutions" each with several campuses. *See* plaintiff's response to Regents Statement No. 1. Plaintiff offers no authority for its dispute with the state law designation of the schools in the LSU and Southern systems as being separate institutions. In any event, this semantic difference is immaterial to the issue at hand.

[2] SUBR and Grambling were designated as "black only" schools by statute. While the statutes creating SUNO in 1956 and SUSBC

institutions that were originally established as "white" schools (LSU-Baton Rouge, LSU-Shreveport, UNO, LSU Law School, Louisiana Tech University, McNeese State University, Nicholls State University, Northeast Louisiana University, Northwestern State University, Southeastern Louisiana State, and the University of Southwestern Louisiana) [3] remain predominantly, and disproportionately, white. Four of the other schools (LSU-Alexandria, LSU-Eunice, LSU Medical Center, and LSU Agricultural Center), whose full histories have not been provided to this Court, are all predominantly, and disproportionately, white. Only one institution, Delgado Community College, appears not to have a student body of predominantly one race.[4] The enrollment statistics by race for 1981, when the consent decree was implemented, and 1987, the last year of the consent decree, are as follows: [5]

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in 1964 do not specifically refer to these two schools as being for blacks only, Louiciana still officially treated these two schools as having been *created* to be "black schools." *See* Plaintiff's Statement No. 28; Regents' Reply to Plaintiff's Statement No. 29.

[3] *E.g.*, Plaintiff's Statement Nos. 13, 21, 24; Regents' Reply to Plaintiff's Statement No. 29.

[4] Black students presently represent about one-third of the student body at Delgado. While this percentage is above the state-wide average of one-quarter, the Court cannot say it is disproportionately so, especially in light of the fact that New Orleans has a higher concentration of black citizens than is found state-wide.

[5] Attachment B to Exhibit 1 to Regents' statement of undisputed facts.

	1981					1987				
	Black		White		Total	Black		White		Total
	#	%	#	%		#	%	#	%	
Delgado	3,371	40.1%	4,348	51.7%	8,404	2,270	32.0%	4,133	58.3%	7,094
Grambling	3,777	98.5%	44	1.1%	3,834	5,435	96.7%	180	3.2%	5,623
LA Tech	1,194	11.6%	8,489	82.5%	10,288	1,132	11.4%	7,482	75.1%	9,970
McNeese	1,062	15.3%	5,706	82.2%	6,943	970	13.2%	6,255	85.0%	7,359
Nichols	1,068	15.0%	5,954	83.6%	7,119	857	12.1%	6,060	85.9%	7,057
Northeast	2,431	22.0%	8,544	77.2%	11,071	1,543	15.6%	8,163	82.7%	9,877
Northwestern	1,296	19.4%	4,448	66.6%	6,682	1,263	20.7%	4,494	73.8%	6,090
Southeastern	1,112	12.6%	7,633	86.2%	8,654	518	6.4%	7,423	91.8%	8,089
Southwestern	2,380	17.4%	10,931	79.8%	13,702	2,523	17.8%	11,195	79.0%	14,172
LSU A	151	9.9%	1,357	88.8%	1,528	202	10.0%	1,782	88.2%	2,020
LSU BR	1,688	6.3%	22,832	84.7%	26,964	2,027	7.9%	22,714	88.0%	25,821
LSU E	237	15.5%	1,283	84.0%	1,526	198	11.5%	1,510	87.8%	1,720
LSU Law	16	1.9%	830	96.1%	864	6	0.8%	689	96.0%	718
LSU S	315	7.6%	3,803	91.5%	4,155	359	8.2%	3,871	86.9%	4,353
UNO	2,491	16.1%	11,519	74.6%	15,432	2,448	15.5%	12,121	76.5%	15,836
SU BR	7,655	86.4%	228	2.6%	8,855	8,654	92.7%	438	4.7%	9,338
SU WO	1,994	82.4%	11	0.5%	2,420	3,185	87.1%	400	10.9%	3,657
SU S	661	95.8%	1	0.2%	662	908	94.5%	41	4.8%	855
Total	32,899	23.6%	97,961	70.3%	139,505	34,398	24.6%	98,963	70.9%	139,649

Despite the slight increase in black enrollment statewide, the racial polarization has increased as a whole during the term of the consent decree: the predominantly white institutions had about 2000 fewer black students in 1987 than in 1981, while the predominantly black institutions showed only a negligible increase in white enrollment from around 0.3% in 1981 to around 1.1% in 1987. In 1981, around 55% of the black students enrolled at institutions of public higher education in the state were enrolled at predominantly white institutions, while in 1987 the corresponding figure fell significantly to about 47%.

Further, a close look at the documents submitted to the Court pursuant to the consent decree suggest that even these abysmal statistics may inaccurately suggest a better racial balance than is reality. Under the consent decree, an exchange student who takes only nine credit hours at another school may be counted as being a full-time student enrolled at that other school,[6] even though the regular state requirement for full-time credit is at least twelve hours of school work. Further, under the decree, an exchange program between UNO and SUNO, among other exchange programs between other proximate state schools, was established. As the program was implemented, certain courses required for graduation at UNO could only be taken at SUNO,[7] although there was not a reciprocal requirement for SUNO students.[8] The

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[6] *See* Consent Decree, Attachment 1, at 14-15.

[7] *See, e.g,* Consent Decree, Attachment 3, Fall 1985 UNO Class Bulletin at 5; Consent Decree, Attachment 4, Spring 1986 UNO Class Bulletin at 5. As the UNO and SUNO class bulletins in the record confirm, these class include certain sections of educational psychology, required for graduation by all education majors, and certain sections of high school teaching classes and of economic principles, both required for graduation for certain teaching fields.

[8] *Compare* UNO class bulletins ("Effective with the 1983 Spring Semester, a student will not be allowed to take a course for a degree

effect, then, was to have UNO (white) students being forced to take occasional classes at SUNO and being counted towards SUNO's voluntary student enrollment, thereby giving a deceptive appearance that the white student enrollment at SUNO was higher than in actuality.

The four boards governing these twenty schools suffer from similar racial identifiability. The Southern Board remains over three-fourths black, while the other three boards are between 70% and 80% white.

In sum, as the Board of Regents states in the first paragraph of its memorandum in support of its motion, "[t]hat the racial identifiability of Louisiana's public colleges and universities persists today is . . . undisputed."

B.

On January 13, 1969, October 21, 1969, May 21, 1973, and November 10, 1973, authorized representatives of the United States Department of Health, Education, and Welfare (HEW) sent the appropriate agents of the State of Louisiana letters charging that Louisiana was operating "a racially dual system of public higher education" in violation of Title VI. The letters requested the State to submit a statewide desegregation plan; believing it was not in violation, the State submitted none.

On January 11, 1974, pursuant to a court order in *Adams v. Richardson*,[9] HEW's General Counsel wrote to

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credit at another college/university in the New Orleans area if that course is being offered at Southern University in New Orleans specifically for the University of New Orleans students.") *with* SUNO class bulletins ("A student registered at Southern University at New Orleans may not receive credits at Southern University of New Orleans for any work taken concurrently at another college or university or by correspondence study, without prior written approval of the Vice Chancellor of Academic Affairs."). In essence, SUNO students may obtain waivers from the exchange program while UNO students appear unable to do so.

[9] 356 F. Supp. 92, 94-95 (D.D.C.), *aff'd as modified*, 480 F.2d 1159, 1165 (D.C. Cir. 1973).

the Assistant Attorney General for Civil Rights of the United States Department of Justice and recommended that appropriate judicial proceedings be brought. Accordingly, on March 14, 1974, the Attorney General commenced this action on behalf of the United States in the Middle District of Louisiana pursuant to sections 601 and 602 of the Civil Rights Act of 1964, as amended,[10] and the Fourteenth Amendment. Plaintiff having properly requested a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284, a three-judge court was convened.

Named as original defendants were the State of Louisiana, the Louisiana State Board of Education, the Louisiana Coordinating Council for Higher Education of the State of Louisiana, the Louisiana State Board of Supervisors, and the Louisiana Board of Regents plus the members of each of these four boards. In March 1976, following the restructuring of Louisiana's higher education boards by the Louisiana Constitution of 1974,[11] the parties jointly moved to substitute the following five defendants in place of the original named defendants: the State of Louisiana, the Board of Regents, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical College, and the Board of Trustees of State Colleges and Universities.

At the consent of all parties, the Court transferred the matter on August 15, 1980 to the Eastern District of Louisiana pursuant to 28 U.S.C. § 1404(a). Trial was later set for September 1981.

In November 1980, plaintiff further amended its complaint to add the State Board of Elementary and Secondary Education (BESE), the St. Bernard Parish School

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[10] 42 U.S.C. §§ 2000d, 2000d-1 (1982).

[11] *See* La. Const. of 1974, art. 8, §§ 5-7.

Board, the Bossier Parish Board, the State Superintendent of Public Education, the Superintendent of Schools for St. Bernard Parish and the Superintendent of Schools for Bossier Parish—all for their supervisory roles over the Bossier Parish Community College and the St. Bernard Parish Community College.[12]

Just prior to the trial, the parties entered into a consent decree, which the Court approved on September 8, 1981.[13] By its terms, the consent decree was to expire automatically on December 31, 1987, unless plaintiff timely filed a motion to determine whether defendants had fully implemented the decree and were operating the State's system of public higher education on a unitary basis.

On December 29, 1987, plaintiff so moved. The Court then set the hearing date for September 22, 1988. Plaintiff has now moved for partial summary judgment on the issue of liability. The Board of Regents and the Bossier Parish School Board have in turn cross-moved for summary judgment on the issue of liability as well. The LSU Board and the Board of Trustee have filed memoranda adopting the Board of Regents' arguments in its motion and in its opposition to plaintiff's motion; the State and BESE have filed a memorandum adopting both the Bossier Parish School Board's motion and the Board of Regents' motion and opposition. The Court deems the LSU Board, the Board of Trustees, the State, and BESE each to be moving for summary judgment as well. The Grambling State University Alumni Association, *amicus curiae*, urges the Court to grant plaintiff's motion. The Southern Board and the St. Bernard Parish School Board

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[12] While the March 1976 motion to substitute defendants appeared to drop the individual board members of the various boards, the November 1980 amended complaint renames these members (as well as the members of BESE and the two parish school boards).

[13] *See United States v. State of Louisiana*, 527 F. Supp. 509 (E.D. La. 1981).

have submitted no motions or memoranda, nor have any of the individual defendants.

II.

A.

At the status conferences held before the Court earlier this year, all counsel appeared to concede, though occasionally for incorrect reasons, that this Court still retained jurisdiction over this matter, despite the passing of the December 31, 1987 termination date in the consent decree. The Board of Trustees now appears to disagree and argues that this matter has become *res judicata*. Because the Board of Trustees misconstrues the terms of the consent decree as to finality and because the issue is jurisdictional, this Court first addresses its present jurisdiction.[14] As explained below, the matter is presently in the same posture it would have been, had no consent decree ever been filed.

In entering into the consent decree, defendants denied all allegations that they were not in full compliance with Title VI and the Fourteenth Amendment.[15] Part III(C) of the decree provides, in part, that "[n]o party waives the right to raise any previously contested issues or any issues addressed in this Decree or in this lawsuit should litigation ensue at the expiration of this Decree or at any prior time thereto." Part IV of the decree, on "Jurisdiction," reads in whole as follows:

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[14] *See United States v. State of Louisiana*, 543 F.2d 1125, 1126 n.2 (5th Cir. 1976).

[15] Consent Decree, Introduction, at 1; *see also id.* at 1-2 ("It is the specific understanding of the parties and of this Court that neither this Consent Decree nor defendants' consent thereto constitutes an admission by defendants or an adjudication by the Court of any violation of law by defendants."); *id.*, pt. VI, Nonadmission and Nondetermination, at 20.

This Court shall retain jurisdiction of this action to assure the implementation of the provisions of this Decree; to monitor the effect of the actions taken pursuant to this Decree; to insure that the Louisiana system of higher education is operated on a unitary basis in all respects; and to consider any motions to modify provisions of this Decree or other appropriate pleadings in this case, subject to the provisions of Part V.

Part V, on "Term of Decree," reads in whole as follows:

A. This Decree shall become effective immediately upon the date of its entry by the Court and shall remain in effect until at least December 31, 1987. The Court shall retain jurisdiction over the case until December 31, 1987.

B. If any party, prior to December 31, 1987, has commenced proceedings either to seek compliance with this Decree or to seek other relief necessarily implicating this Decree, this Court shall retain jurisdiction over this action until all issues relating to such proceedings have been resolved.

C. On December 31, 1987, this Decree shall terminate automatically and without further formality unless the plaintiff by motion requests this Court to conduct a hearing for the purpose of determining whether the defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis.

D. Should this Court determine, at the time of the hearing, that the State of Louisiana and all defendant higher education boards have effectively implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis, the defendants shall be released from the jurisdiction of this Court and this Decree shall be terminated. In such hearing brought upon motion

of plaintiff, the burden of proof shall be upon the plaintiff to prove that the defendants have not fully implemented the provisions of this Decree.

E. Should this Court determine at the time of the hearing that any provision of the Consent Decree has not been effectively implemented or that the defendants are not operating the system of public education in a manner consistent with the goals and objectives of this Decree, this Court shall enter such orders to provide additional or further relief as is appropriate and shall retain jurisdiction until such implementation has been accomplished.

As Part IV of the decree acknowledges, it is axiomatic that this Court retains jurisdiction over this matter at all times necessary to effectuate the provisions of the decree. While the second sentence of Part V(A) appears literally to suggest that in all events this Court loses jurisdiction over this matter on December 31, 1987, such a literal reading is plainly illogical in light of the remaining provisions of Part V. The "unless" clause in part V(C) contemplates that a hearing may be brought *after* December 31, 1987; such a hearing would be meaningless unless it were further understood that this Court retained jurisdiction to conduct the hearing. Further, Part V(E) acknowledges that this Court shall retain continuing jurisdiction after the hearing to effectuate any order entered arising from the hearing. Finally, Part III(C) specifically contemplates litigation at the expiration of the decree.

On December 29, 1987, two days before the decree was due to expire automatically, plaintiff filed a motion for a hearing in accordance with Part V(C) of the decree. The act, of its own force, extended this Court's jurisdiction until its resolution of question "whether the defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis." If the Court determines the answer

is yes, then in accordance with Part V(D), the decree would terminate and this Court's jurisdiction would end.[16] If the Court determines the answer is no, then in accordance with Part V(E), the Court continues to retain jurisdiction.

A finding that defendants have not effectively implemented the decree or that Louisiana's public higher education system is not being operated on a unitary basis does not necessarily require the Court to compel compliance with the decree's provisions; instead, the Court is only "to provide additional or further relief as is appropriate." If the Court determines that compliance with the decree will effectively and best eliminate any dual system, then the appropriate relief will be such an order of compliance; if the Court determines otherwise, however, the appropriate relief may differ from the provisions of the decree. In other words, among the implicit provisions of the consent decree itself is the possibility that this Court may find that the decree has failed in its purpose and thus may craft a remedy as if no decree had ever been made.

With this background, it should be patent that the doctrine of *res judicata* has no place at this juncture in this matter. On the one hand, a system does not become unitary merely upon entry of a court order, including a consent decree, intended to transform it into a unitary system.[17] On the other hand, because of plaintiff's motion for a hearing, the consent decree has not yet expired (although because plaintiff waited so that the hearing would have to fall after the consent decree term, any

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[16] *See United States v. Overton*, 834 F.2d 1171, 1174, 1176 (5th Cir. 1987); *United States v. Lawrence County School District*, 799 F.2d 1031, 1037 (5th Cir. 1986).

[17] *Lawrence County*, 799 F.2d at 1037 & n.5.

available remedies necessarily precluded enforcement of the specific monetary obligations under the decree since these obligations ended in 1987 under the decree).[18] In sum, there has been no order or judgment that Louisiana's public higher education system has achieved a unitary basis.

In short, the Court now sits in the same procedural position it sat in 1981 before the decree was implemented, when the parties were preparing for trial on the merits. As explained below, the Court holds that plaintiff has proper standing to bring this action under Title VI, that Title VI's broadened reach is constitutional, that the twenty institutions under the four higher education boards are continuing to be operated under an unlawful, dual system of education in violation of Title VI, but that the two community colleges under BESE are not so continuing.

B.

Having received a referral from HEW, the Attorney General has authority to sue on behalf of the United States to enforce statutory requirements under Title VI.[19] Providing federal funds to defendants, the United States has standing to enforce the Title VI contractual assurances of nondiscrimination upon which its money allotments are made.[20] This much is undisputed.

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[18] *See Overton*, 834 F.2d at 1174.

[19] *United States v. Marion County School District*, 625 F.2d 607, 611-13 (5th Cir. 1980), *cert. denied*, 451 U.S. 910, 101 S. Ct. 1980, 68 L.Ed.2d 298 (1981); Civil Rights Act of 1964, tit. VI, § 602, 42 U.S.C. § 2000d-1 (1982); *see Cannon v. University of Chicago*, 441 U.S. 677, 722 n.9, 99 S. Ct. 1496, 1971 n.9, 60 L.Ed.2d 560 (1979) (White, J., dissenting); 45 C.F.R. § 80.8(a); *see also* 28 C.F.R. § 50.3 (policy statement for enforcing Title VI).

[20] *United States v. Tatum Independent School District*, 306 F. Supp. 285, 288 (E.D. Tex. 1969); *see Marion County*, 625 F.2d at 609-11, 617.

Defendants dispute whether the United States has standing to assert claims directly under Fourteenth Amendment.[21] In seeking to enforce defendants' contractual assurances of compliance with Title VI, the United States is simply seeking to enforce the Fourteen Amendment, for Title VI's standard is that of the Fourteenth Amendment.[22] In other words, whatever relief is available to a private plaintiff in a school desegregation suit under the Fourteenth Amendment is available to the United States under Title VI. With this understanding of the enforceability of the United States' contractual rights, the Court need not pass on defendants' dispute.[23]

C.

In March 1988, over the veto of the President,[24] Congress amended Title VI through its Civil Rights Restora-

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[21] *Compare United States v. State of Mississippi*, 229 F. Supp. 925, 975-76 (S.D. Miss. 1964) (three-judge court) (Brown, J., dissenting) (United States has standing under the Fourteenth and Fifteenth Amendments to vindicate voting rights), *majority opinion rev'd on other grounds*, 380 U.S. 128, 85 S. Ct. 808, 13 L.Ed.2d 717 (1965) *with United States v. Philadelphia*, 644 F.2d 187 (3d Cir. 1980) (United States has no standing under the Fourteenth Amendment) *and United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979) (same) *and United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977) (same); *see also United States v. State of Alabama*, 828 F.2d 1532, 1547 (11th Cir. 1987) (per curiam) (United States conceding it had no standing on the Fourteenth Amendment claim), *cert. denied sub nom. Board of Trustees of Alabama State University v. Auburn University*, —— U.S. ——, 108 S. Ct. 2857, —— L.Ed. 2d —— (1988).

[22] *Marion County*, 625 F.2d at 615 & n.20.

[23] *Id.* at 617.

[24] *See Message to the Senate on Civil Rights Legislation*, 24 Weekly Compilation of Presidential Documents 353 (Mar. 16, 1988).

tion Act of 1987.[25] The purpose[26] of the amendment was to overrule *Grove City College v. Bell*,[27] which held that the reach of the similar Title IX of the Education Amendments of 1972[28] was solely a program-specific mandate and did not apply to an entire school system. The effect of the amendment, to quote defendants, "is to submit an entire university system to federal regulation under [Title VI] if any of its programs receive federal assistance."[29] It appears that this Court is the first to address the amendment or any other part of the new act in any context.

Defendants argue that Congress lacked the constitutional authority to broaden Title VI in the manner it did. They premise their argument on two points, with which

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[25] Pub. L. No. 100-259, § 6, 102 Stat. 28, 31 (1988) (codified at 42 U.S.C. § 2000d-4a). The Act amends Title VI by adding at the end a section 606, which reads in pertinent part:

> Sec. 606. For the purposes of this title, the term 'program or activity' and the term 'program' mean all the operations of—
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> (1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
>
> . . . .
>
> any part of which is extended Federal financial assistance.

[26] S. Rep. No. 64, 100th Cong., 1st Sess. 2 (1987), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3, 4.

[27] 465 U.S. 555, 570-74, 104 S. Ct. 1211, 1220-21, 79 L.Ed.2d 516 (1984).

[28] Pub. L. No. 92-318, tit. IX, 86 Stat. 373-75 (codified at 20 U.S.C. §§ 1681-1686 (1982)).

[29] Memorandum in Support of Board of Regents' Motion for Summary Judgment, at 78 [hereinafter Regents' First Memorandum].

this Court agrees: that Congress' constitutional power to enact Title VI comes under the constitution's spending power clause;[30] and that the holding of *Grove City* applies equally to Title VI.[31] Defendants then conclude two further points: *Grove City* interpreted Title IX, and by analogy Title VI, to its constitutional limit; therefore, or in the alternative, Congress exceeded its power in enacting the new act. Defendants misread *Grove City* and misconstrue Congress' spending power.

Defendants' first conclusion, that *Grove City*'s holding was a constitutional one, is wholly without support. While it is well established that Congress cannot legislatively overrule a constitutional holding of a federal court, neither *Grove City* nor any of the other pre-Title VI amendment cases purports to be a constitutional decision by holding that Title VI did not cover an entire school or school system when federal funds were going only to a narrow, specific program therein. These cases were all construing Title VI and its progeny's original text and Congress' objective, identifiable intent in enacting these

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[30] *Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582, 598-99, 103 S. Ct. 3221, 3230-31, 77 L.Ed.2d 866 (1982) (opinion of White, J.); *id.* at 633, 103 S. Ct. at 3249 (Marshall, J., dissenting); *State of Alabama*, 828 F.2d at 1547; *see* U.S. Const., art. 1, § 8, cl. 1.

This Court questions, without deciding, whether Congress also had authority under section 5 (the Congressional enforcement section) of the Fourteenth Amendment to enact Title VI. *See The Civil Rights Cases*, 109 U.S. 3, 11, 3 S. Ct. 18, 21, 27 L.Ed. 835 (1883).

[31] *State of Alabama*, 828 F.2d at 1546-51; *see United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, ——, 106 S. Ct. 2705, 2711, 91 L.Ed.2d 494 (1986); *Grove City*, 465 U.S. at 566, 104 S. Ct. at 1218 ("Title IX was patterned after Title VI"); *see also Board of Public Instruction of Taylor County, Florida v. Finch*, 414 F.2d 1068, 1076-78 (5th Cir. 1969), *cited with approval in North Haven Board of Education v. Bell*, 456 U.S. 512, 538, 102 S. Ct. 1912, 1936, 72 L.Ed.2d 299 (1982).

laws.[32] Nor does the legislative history to Title VI's amendment suggest otherwise; the written objections of the President and certain Senators to the Amendment did not concern the overruling of *Grove City* to "prohibit discrimination . . . *across the board* in . . . public systems of higher education." [33] Indeed, defendants at one point concede that "the issue [in *Grove City*] was not framed in terms of the constitutionality of the statute." [34]

Thus, the Court must address defendants' alternative conclusion, that notwithstanding any judicial silence, the *Grove City* holding implicitly amounted to a constitutional holding. In other words, the Court must determine whether Congress exceeded its spending clause power by amending Title VI as it did.

The Supreme Court has recently articulated four limitations to Congress' spending power: first, the existence of this power must be in pursuit of the "general welfare"; second, if Congress desires to condition receipt of federal funds, it "must do so unambiguously"; third, conditions on federal grants must be germane, or related, to the federal interest at issue; and finally, other constitutional provisions must not provide an independent bar to

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[32] *E.g., Grove City*, 465 U.S. at 570, 104 S. Ct. at 1220 ("An analysis of Title IX's language and legislative history led us to conclude . . ."); *State of Alabama*, 828 F.2d at 1549 ("Congress intended Title VI to apply to . . .").

[33] 24 Weekly Comp. Pres. Docs. at 353 (emphasis in original) (describing a bill the President wanted passed in lieu of the Senate Bill that passed, S. 557). They agreed with the decision to overrule *Grove City*. *Id.*; Sen. Rep. 64, *supra* note 26, at 37 (minority view), *reprinted in* 1988 U.S. Code Cong. & Admin. News at 35. The principal objection was that the amendment, as drafted, would interfere with the exercise of certain fundamental rights under the First Amendment, particularly, the freedom of religion. *Id.*; 24 Weekly Comp. Pres. Docs. at 354; *see also* Buckley, *Double Talk on Civil Rights Act*, (New Orleans) Times-Picayune, Mar. 26, 1988, at A-19, cols. 1-3.

[34] Regents' First Memorandum at 86.

the conditional grant of federal funds.[35] Defendants concede that the first and last conditions are satisfied here.[36] Their dispute is solely over the application of the second and third conditions.

Concerning the second condition, the Court notes the Supreme Court's discussion on this point in *Pennhurst State School and Hospital v. Halderman*: [37]

> [L]egislation enacted pursuant to Congress' spending power is much in the nature of a contract: in return for federal funds, the State agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.[38]

Defendants state that "[s]ystem-wide application of Title VI to a state's entire education system is an ambiguous condition because it is impossible for the state to know what the condition will entail." [39] Defendants' statement is misplaced. While the statutory change effected by the amendment to Title VI may be onerous on both those who

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[35] *South Dakota v. Dole*, —— U.S. ——, ——, 107 S. Ct. 2793, 2796-97, 97 L.Ed.2d 171 (1987) (upholding the constitutionality of a federal statute conditioning states' receipts of highway funds on the adoption of a minimum drinking age of 21).

[36] Because defendants do not raise the issue and the issue does not otherwise appear applicable in this case, the Court expresses no opinion on the possible First Amendment objections raised by the President and others, *see supra* note 33.

[37] 451 U.S. 1, 101 S. Ct. 1531, 67 L.Ed.2d 694 (1981).

[38] *Id.* at 17, 101 S. Ct. at 1540 (citations and footnote omitted).

[39] Regents' First Memorandum at 82.

have discriminated and those beyond reproach,[40] the statutory change is, if anything, clear: now an entire school system is subject to Title VI's reach as long as the smallest part of the system receives any federal funds. The amendment does not, and does not attempt to, change the nature of a State's duty under Title VI; this duty remains as it always has been, the same duty as under the Fourteenth Amendment, the duty not to discriminate on the basis of race.[41] It is no defense that particulars of the remedy needed to cure a State's breach of Title VI (e.g., to cure a State's maintenance of a dual system of education in particular programs or in entire school systems)[42] may remain unknown to the breaching State before the remedy is voluntarily accepted by all parties involved or is ordered by a court; to accept defendants' position would imply that Congress may impose absolutely no conditions under Title VI inasmuch as the particulars on remedy always vary with the scope and nature of the breaches. As suggested in Part II(D) below, the goal of any remedy remains constant: the disestablishment of any discrimination.

Defendants further suggest that, contrary to the "contract" theory of Congress' spending power, the amendment would impose a retroactive condition on defendants. Defendants' cries of fairness are again misplaced. Any

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[40] *See Grove City*, 465 U.S. at 579, 104 S. Ct. at 1224 (Powell, J., concurring) (describing the inequities in having the college, against which there was not the slightest suggestion of any type of discrimination, comply with the myriad of federal reporting requirements under Title VI).

[41] *See supra* text accompanying note 22 and *infra* text accompanying notes 47-77.

[42] The Court observes that defendants' misplaced argument on remedy in no way depends on any changes brought about by the amendment to Title VI; any uncertainty about a particular remedial measure exists whether the measure is applied to one department of one school or to an entire school system.

liability of defendants is for a present violation of Title VI, not for past violations.[43]

Finally, the Court can give little credence to defendants' position that "system-wide interpretation of Title VI also exceeds Congress' spending power because the condition is not germane to the federal interest in the particular grant programs."[44] As further explained in Part II(D) below, the condition imposed by Congress on defendants, that they may not discriminate on the basis of race in any part of the State's system of public higher education, is directly related to one of main purposes for which public education funds are expended:[45] equal education opportunities to all citizens.

In sum, this Court concludes that Congress has not exceeded its spending power in enacting Title VI as amended, insofar as the instant case is concerned.[46] It is not this Court's role to evaluate the wisdom in Congress' amendment; the Court's limited role in reviewing a Con-

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[43] *See also Bazemore v. Friday*, 478 U.S. 385, ——, 106 S. Ct. 3000, 3007, 92 L.Ed.2d 315 (1986) (under Title VII, defendant had "an obligation to eradicate present salary disparities based on race that began prior to the effective date of Title VII").

[44] Regents' First Memorandum at 83.

[45] *See Dole*, —— U.S. at ——, 107 S. Ct. at 2797.

[46] Even if the amendment to Title VI were unconstitutional so that the reach of Title VI was only to the extent defined in *Grove City*, it would not necessarily follow that the State's entire public university system would not come within the reach of Title VI. The record does not reveal whether federal education funds to the State are earmarked to specific, discrete programs or instead are, at least partially, nonearmarked so that the State can spend the federal funds in the system however the State and its boards sees fit. *See, e.g., Grove City*, 465 U.S. at 573, 104 S. Ct. at 1211 (distinguishing between "earmarked" and "nonearmarked" funds). To suggest that pre-amendment Title VI could not at times reach an entire education system would condemn the innumerable primary/secondary school system decrees wherein courts have ordered and administered system-wide desegregation plans.

gressional statute is only to determine if the statute is constitutional as applied to the case at issue. Having determined as much, the Court addresses below whether defendants have satisfied the conditions imposed under Title VI, that is, the conditions of complying with the Fourteenth Amendment.

D.

The basic principles at issue in this case have been well established by the Supreme Court. "Separate education facilities [on the basis of race] are inherently unequal" [47] in violation of the Fourteenth Amendment and must be corrected "with all deliberate speed." [48] Where a state has previously maintained a racially dual system of public education established by law, it has the burden, or affirmative duty, "to take the necessary steps 'to eliminate from the public schools all vestiges of state-imposed segregation.'" [49] Further, "freedom-of-choice" policies (policies where students can freely choose what schools they attend) may at times be insufficient to satisfy this affirmative duty with timely adequacy.[50] The mere existence of a school with a student body of predominantly one

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[47] *Brown v. Board of Education of Topeka, Kansas (Brown I)*, 347 U.S. 483, 495, 74 S. Ct. 686, 692, 98 L.Ed. 873 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L.Ed. 256 (1896)).

[48] *Brown v. Board of Education of Topeka, Kansas (Brown II)*, 349 U.S. 294, 301, 75 S. Ct. 753, 757, 99 L.2d 1083 (1955).

[49] *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 289-90, 97 S. Ct. 2749, 2762, 53 L.Ed.2d 745 (1977), quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S. Ct. 1267, 1275 28 L.Ed.2d 554 (1971)); *see Davis v. East Baton Rouge Parish School Board*, 721 F.2d 1425, 1435 (5th Cir. 1983) ("until it has achieved the greatest degree of desegregation possible under the circumstances, the Board bears the continuing duty to do all in its power to eradicate the vestiges of the dual system.").

[50] *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430, 88 S. Ct. 1689, 20 L.Ed.2d 716 (1968).

race is, however, "not a violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions on the part of" the state.[51] In short, the "principles and ends can be collapsed into quality education without regard to race."[52]

While the Supreme Court's school desegregation opinions following *Brown* have all concerned primary and secondary education, lower courts have been unanimous in holding that this constitutional mandate to dismantle a racially dual structure applies in the higher education context as well.[53] As this Court has already recognized,

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[51] *Dayton Board of Education v. Brinkman (Brinkman I)*, 433 U.S. 406, 413, 97 S. Ct. 2766, 2772, 53 L.Ed.2d 851 (1977) (citing *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040, 2047, 48 L.Ed.2d 597 (1976) (an equal protection violation is not established merely by proving that a practice has a disproportionate impact on minorities)).

[52] *United States v. Pittman*, 808 F.2d 385, 393 (5th Cir. 1987) (Higginbotham, J., concurring).

[53] *See, e.g., Geier v. Alexander (Geier II)*, 801 F.2d 799, 802 (6th Cir. 1986); *Geier v. University of Tennessee (Geier I)*, 597 F.2d 1056, 1065 (6th Cir.), *cert. denied*, 444 U.S. 886, 100 S. Ct. 180, 62 L.Ed.2d 117 (1979); *Lee v. Macon County Board of Education*, 453 F.2d 524, 527 (5th Cir. 1971) (per curiam); *Ayers v. Allain*, 674 F. Supp. 1523, 1551 (N.D. Miss. 1987), *appeal pending*, No. 88-4103 (5th Cir.); *United States v. State of Alabama*, 628 F. Supp. 1137 (N.D. Ala. 1985), *rev'd on other grounds*, 828 F.2d 1532 (11th Cir. 1987), *cert. denied sub nom. Board of Trustees of Alabama State University v. Auburn University*, —— U.S. ——, 108 S. Ct. 2857, —— L.Ed.2d —— (1988); *Norris v. State Council of Higher Education for Virginia*, 327 F. Supp. 1368, 1373 (E.D. Va.) (three-judge court), *aff'd per curiam without written opinion sub nom. Board of Visitors of the College of William and Mary in Virginia v. Norris*, 404 U.S. 907, 92 S. Ct. 227, 30 L.Ed.2d 180 (1971); *Alabama State Teachers Association (ASTA) v. Alabama Public School and College Authority*, 289 F. Supp. 784, 787 (M.D. Ala. 1968) (three-judge court), *aff'd per curiam without written opinion*, 393 U.S. 400, 89 S. Ct. 681, 21 L.Ed.2d 631 (1969); *Lee v. Macon Country Board of Education*, 267 F. Supp. 458, 474, 484

however, many of the policies and problems concerning primary and secondary education differ widely from those concerning higher education; thus, many of the means for effectuating the affirmative duty must differ between the two contexts.[44] Dispute lies primarily over the issue whether the scope of the duties and the remedies in the higher education context is as broad as has been defined and applied in the elementary and secondary education context.[55]

On the one hand, some courts have found states to have satisfied their duties in the higher education context by implementing good faith, racially neutral policies and practices where students are free to enroll where they wish, even where there continued to exist racially identifiable institutions within the state's public higher education system.[56] On the other hand, some courts have held that more is, at times, required.[57]

Both plaintiff and defendants argue that the Supreme Court's recent case of *Bazemore v. Friday*[58] adopts the

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(M.D. Ala. 1967) (three-judge court) (per curiam), *aff'd per curiam without written opinion sub nom. Wallace v. United States*, 389 U.S. 215, 88 S. Ct. 415, 19 L.Ed.2d 422 (1967); *cf. United States v. LULAC*, 793 F.2d 636, 648-49 (5th Cir. 1986); *Adams v. Richardson*, 480 F.2d 1159, 1164-65 (D.C. Cir. 1973) (per curiam en banc).

[54] *United States v. State of Louisiaan*, 527 F. Supp. 509, 514 (E.D. La. 1981) (and cases cited therein); *see also Geier I*, 597 F.2d at 1065; *Lee*, 453 F.2d at 527; *Ayers*, 674 F. Supp. at 1553-54; *ASTA*, 289 F. Supp. at 287-88.

[55] *Ayers*, 674 F. Supp. at 1552.

[56] *See id.* at 1552-54; *ASTA*, 289 F. Supp. at 789-90; *cf. Adams*, 490 F.2d at 1165 & n.11 (appearing to suggest that the existence of all-black public colleges is not only constitutional, but also, in the court's words, "crucial" for the viable training of minority students).

[57] *Geier I*, 597 F.2d at 1067; *see Norris*, 327 F. Supp. at 1372-73.

[58] 478 U.S. 385, 106 S. Ct. 3000, 92 L.Ed.2d 315 (1986).

former standard and rejects the latter for the higher education context.

In *Bazemore*, black employees and the United States sued the North Carolina Agricultural Extension Service (NCAES), a State agency; they alleged, among other things, that a pattern and practice of racial discrimination still existed in the NCAES-sponsored 4-H and Homemaker Clubs, which prior to 1965 had been segregated by law. The District Court had found that since 1965, the NCAES had adopted an open-door policy and that no person had been denied membership to any club on the grounds of race.[59] It further had found that a bulk of the 4-H and Homemaker Clubs remained all-white or all-black but that "any racial imbalance existing . . . was the result of wholly voluntary and unfettered choice of private individuals." [60]

While the Court was unanimous on several points, a 5-4 majority held that "the mere continued existence of single race clubs does not make out a constitutional violation" where "one's choice of a club is entirely voluntary." [61] The majority distinguished *Green*:

> *Green v. School Board of New Kent County* . . . held that voluntary choice programs in the public schools were inadequate and that the schools must take affirmative action to integrate their student bodies. It was the effective predicate for imposing busing and pupil assignment programs to end dual school systems, but it has no application to the voluntary associations supported by the Extension Service. . . . While school children must go to school, there is no compulsion to join 4-H or Homemaker Clubs, and while School Boards customarily have the power to

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[59] *Id.* at ——, 106 S. Ct. at 3012.

[60] *Id.* at ——, 106 S. Ct. at 3012.

[61] *Id.* at ——, 106 S. Ct. at 3013.

> create school attendance areas and otherwise designate the school that particular students may attend, there is no statutory or regulatory authority to deny a young person the right to join any Club he or she wishes to join. . . . And however sound *Green* may have been in the context of public schools, it has no application to this wholly different milieu.[62]

In short, the majority found the distinction between voluntary, extracurricular clubs and (elementary and secondary) public schools to be legally significant. Both the majority and the dissent were silent on any effect of the Court's holding in the context of higher education.

Two lower courts have since addressed this 5-4 portion of *Bazemore*, both in the context of higher education. The two courts came to opposite conclusions.

In *Ayers v. Allain*,[63] a federal district court in Mississippi held that Mississippi was no longer operating a dual system of public higher education. After trial on the merits, the court read *Bazemore* as drawing a critical distinction between elementary/secondary education and higher education.[64] The court explained:

> In the college and university education context, however, where individuals have traditionally enjoyed free choice as to whether and when to attend school, the courts have considered it inappropriate to require state officials to maximize integration when assessing official action vis-a-vis the affirmative duty to disestablish a former *de jure* segregated system. The wisdom of this approach does not rest solely upon traditional notions, however. It also rests on the qualitative distinctions existing between the

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[62] *Id.* at ——, 106 S. Ct. at 3013.

[63] 674 F. Supp. 1523 (N.D. Miss. 1987), *appeal pending*, No. 88-4103 (5th Cir.).

[64] *Id.* at 1553.

> post-secondary and the elementary-secondary education systems. Elementary and secondary schools in a single district tend to be fungible in the sense that they generally strive towards uniformity in offerings, facilities and services. The opposite is true in higher education. A special emphasis is placed upon the relative uniqueness of the separate institutions comprising a public system of higher education. Indeed, the uniqueness of institutions[,] which results from the confluence of course offerings, services, size, location, faculty and students found at each institution, explains why freedom of choice is so valued and why the courts have not required the restriction of student choice in higher education.[65]

The test, the court found, was whether "current state higher education policies and practices . . . are racially neutral, developed and implemented in good faith, and do not substantially contribute to the continued racial identifiability of individual institutions."[66] The court then applied its test to several categories (admissions policies, student recruitment and retention, assignment of institutional missions, allocation of funding, facilities, duplication of programs, faculty, and staff employment) to conclude that Mississippi was no longer running a dual system of higher education. *Ayers* is now on appeal before the Fifth Circuit.

In *Geier II*,[67] the Sixth Circuit affirmed the district court's approval of a consent decree using racial quotas for certain student recruitment in a university desegregation suit; the United States, as intervenor, was the sole party to oppose the consent decree. Rejecting the argument that *Green* does not control for higher education because such is voluntary, the court explained:

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[65] *Id.* at 1554.

[66] *Id.*

[67] *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986).

> It appears fallacious to attempt to extend *Bazemore* to any level of education. While membership in 4-H and Homemaker Clubs offers a valuable experience to young people and families, particularly in rural areas, it cannot be compared to the value of an advanced education. The importance of education to the individual and the interest of the state in having its young people educated as completely as possible indicate clearly that the holding in *Green* rather than that of *Bazemore* applies.
>
> It was established as the law of the case in the present litigation more than 15 years ago that *Green* applies to desegregation of public higher education. . . . Nothing in the *Bazemore* decision, where the compelling interest of a state in the education of its citizenry was not involved, requires us to reaxamine these holdings.[68]

It is unclear whether the Sixth Circuit specifically considered the distinction later noted in *Ayers*; it is clear, however, that the Sixth Circuit wholly rejects the approach in *Ayers* for *all* college contexts.

While the rationale in *Ayers* is not without merit[69] and while the United States' position that *Bazemore* applies is entitled to some deference,[70] this Court cannot

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[68] *Id.* at 805.

[69] This Court does not mean to suggest that the ultimate holding in *Ayers* is, in this Court's view, in error. The facts in Mississippi's system are far more encouraging than Louisiana's. Among other things, Mississippi does not have three cities each with one "black" and one "white" college; with just eight senior colleges, Mississippi does not have the excessive program duplication found in Louisiana. Further, its faculty and student recruitment programs are far more developed than Louisnana's. Perhaps, Mississippi's apparent greater success lies in its establishment of numerous junior colleges and of its admissions requirements for its senior college.

[70] *See Bazemore*, 478 U.S. at ——, 106 S. Ct. at 3013. Plaintiff's position is curious, for if *Bazemore* applied, defendants would almost surely be entitled to summary judgment.

read *Bazemore* as directing that *Green* not apply to the instant case. As the Sixth Circuit noted in *Geier II*, club membership may be a valuable experience to many of our youth, but such cannot compare to the national need for educated citizens. The rationale in *Green* for finding that racially neutral admissions policies may at times be insufficient to satisfy the constitutional mandate to achieve unity systems of public education carries the same force in the higher education context as it does in the primary and secondary education context; all deliberate speed to achieve non-racially identifiable colleges is a must, just as it is for primary and secondary schools. When open admissions alone fail to disestablish a segregated school system, be it a primary/secondary school system or a college system, then something more is required.[71]

In the higher education context, of course, busing and mandatory attendance zones are not available solutions as they may be in the primary and secondary school context; [72] it does not follow, however, that nothing beyond open admissions is required to dismantle the dual system. Had the Supreme Court held in *Green* or elsewhere that the remedies beyond open admissions policies were limited to policies of mandatory student assignments to particular schools or programs, then this Court would be more inclined to follow the approach in *Ayers*. Such, however, is not the case. This distinction between primary/secondary education and higher education simply means that the appropriate remedy may well differ in the two contexts.

In vast, ever-growing segments of the American workforce, a high school diploma is not enough; a college education is often more critical than a high school education. The argument that the State requires students to attend

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[71] *Geier II*, 801 F.2d at 801.

[72] *Geier II*, 801 F.2d at 802.

primary and secondary schools [73] but cannot, or at least does not, require them to attend college fails to acknowledge the realities of our nation today. The purpose for a State's broad police power [74] to enact truancy and other regulatory school laws—its power to require children to attend primary and secondary schools—is to promote an educated, self-supporting citizenry that can effectively and intelligently participate in our society.[75] While the State may not legally require its citizens to pursue a higher education, the fundamental interests that support a State's police power in the primary and secondary school context nonetheless still exist with all their force and reasoning for the higher education context; these underlying interests of American society are what compel persons to seek higher education on their own volition. If blacks and other minorities are to compete in the market place for the more attractive and higher paying jobs in business and industry and to avail themselves of the benefits of corporate affirmative action programs, they need a college degree. In short, the ante for entrance into the top careers today is a college degree rather than a high school diploma.

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[73] For Louisiana's compulsory school attendance laws for children below the age of 17, see La. Rev. Stat. Ann. §§ 17:221-:237 (West 1982 & West Supp. 1988). *See also Livingston Parish School Board v. Lofton*, 422 So. 2d 1357, 1359 (La. App. 1st Cir. 1982) (citing *State v. Pettifield*, 210 La. 609, 27 So. 2d 424, 426 (1946)).

[74] *See Wisconsin v. Yoder*, 406 U.S. 205, 213, 92 S. Ct. 1526, 1532, 32 L.Ed. 2d 15 (1972) (citing *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534, 45 S. Ct. 571, 573, 69 L.Ed.2d 1070 (1925)); *see id.* at 239, 92 S. Ct. at 1545 (White, J., concurring) ("reemphasiz[ing] the legitimacy of the State's concern for enforcing minimal educational standards").

[75] *Id.* at 221, 92 S. Ct. at 1536; *id.* at 240, 92 S. Ct. at 1545 (White, J., concurring); *see Brown I*, 347 U.S. at 493, 74 S. Ct. at 691; *see also Duro v. District Attorney*, 712 F.2d 96, 97, 99 & n.3 (4th Cir. 1983), *cert. denied*, 465 U.S. 1006, 104 S. Ct. 998, 79 L.Ed.2d 230 (1984); *id.* at 99-100 & n.1 (Sprouse, J., concurring).

In failing to achieve a truly unitary system at the higher level of public education, the State continues to provide polarization and separation on a racial basis. If we are working to breaking down barriers to race at all levels, we cannot overlook the socio-economic value of having integration at the college level. The interaction of the better minds, the exchange of various thoughts and aspirations, and the contacts made at college are factors to be considered, for these benefits carry over to the business world. In other words, there is something to the "old boy network." Separate colleges for blacks and whites obviously promotes a continuation of separate societies after graduation.

Defendants would have the law be that so long as there is freedom of choice in a State's public higher education system, a racially identifiable dual system is constitutional because a college student is mobile and can go to any State college he wishes. This position could, of course, only be considered if the State gave each school the same facilities and financial support so that the student would have a wholly free choice in deciding whether to attend one of the predominantly black schools or one of the predominantly white schools.[76] This, however, would come treacherously close to a mandate of the "separate but equal" doctrine, which has been emphatically rejected ever since *Brown I*. Unfortunately, this scenario more or less accurately describes the situation that has occurred in Louisiana today under the consent decree. The predominantly black schools complain that they do not have the same support and facilities as do the predominantly white schools and should be given more money to

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[76] Of course, there could be some freedom of choice, without the State maintaining separate but equal facilities, by providing a difference in support in faculty, facilities, and programs at the various state institutions along with open admissions policies. The absurdity of seriously espousing such a plan is so apparent that no further comment is required.

enhance such in order to encourage more blacks to attend better college; their concern appears to be in maintaining their positions and status rather than in achieving integration.

This Court does not mean to suggest that freedom of choice must be abandoned in the higher education context; [77] on the contrary, it is the very element, among others, wherein the consent decree as implemented has failed. For example, under the consent decree, certain UNO students were required without exception to take courses at SUNO, but corresponding SUNO students could avoid taking cross-courses at UNO. Although the State has the authority, and should be encouraged, to promote different and unique types of higher learning institutions, the State fails when it fosters two universities or colleges in close geographic proximity offering overlapping courses and programs—especially where one is predominantly black and one is predominantly white.

The Fifth Circuit has found schools that are 71% black to be "clearly racially identifiable" [78] and as such to be "just such a vestige [of a racially discriminatory, dual school system]." [79] The four state universities that were established as black schools remain from 87% to 97% black; those white, from 74% to 96% white. Contrary to the Court's earlier expectations, the consent decree as implemented has proved no viable solution. If anything, the consent decree has exacerbated the segregation; many of the schools are more racially polarized now than they were just before the consent decree was implemented in 1981.

The United States suggests that a unitary system was not established under the consent decree because the

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[77] *See ASTA*, 289 F. Supp. at 790.

[78] *United States v. Lawrence County School District*, 799 F.2d 1031, 1039 (5th Cir. 1986).

[79] *Id.* at 1043.

State did not fully implement all the terms of the consent decree. While, primarily because of the State's recent economic downturn, the State did not spend all the money called for by the consent decree, the State did spend over $200 million towards the consent decree. It is now apparent that the failure was not in spending too little, but rather was in the entire structure of the consent decree. If money were the sole problem, then there should still be improvement, though perhaps an insufficient improvement for constitutional purposes, in the desegregation of Louisiana's public universities. The consent decree as implemented was directed more towards merely enhancing the State's black schools as black schools rather than towards "convert[ing] its white colleges and black colleges to just colleges." [80]

Without deciding at this time what remedy must be implemented, the Court does acknowledge that a drastic change may be required to remedy the remaining vestiges of the former *de jure* segregated system.[81] A possible remedy that suggests itself to the Court would be one that (1) reduces the number of senior colleges and many of their duplicative programs, in particular, to avoid the duplication in institutions in the same vicinity,[82] (2) institutes a system of a junior colleges with open admissions to all high-school graduates, (3) institutes higher minimum entrance requirements to the remaining senior colleges,[83] and (4) vests the State supervision over the institutions to a single board.

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[80] *Norris*, 327 F. Supp. at 1373 (citing *Sanders v. Ellington*, 288 F. Supp. 937, 942 (M.D. Tenn. 1968)).

[81] *See Geier II*, 802 F.2d at 802.

[82] *See Ayers*, 674 F. Supp. at 1541 ("this large amount of unnecessary duplication of programs at institutions which in some cases are less than 50 miles apart in sparsely populated areas is not a model of economic efficiency); *id.* at 1540.

[83] *Cf. LULAC*, 793 F.2d at 649 (there is no duty for higher education to compensate for constitutional infirmities at secondary/primary levels).

E.

In Part II(D) above, the Court held that the State by, through, and with its four higher education boards have failed to meet their obligations under Title VI. A separate question is involved, however, for Bossier Parish Community College (BPCC) and St. Bernard Parish Community College (SBPCC), which are under the aegis not of any of the four higher education boards, but of BESE and the two respective parish (primary/secondary education) school boards.

Plaintiff has submitted no opposition to the Bossier Parish School Board's summary judgment motion (which is joined by BESE) and further makes absolutely no mention of either BPCC or SBPCC in its summary judgment motion or in its accompanying documentation. As plaintiff's amended complaint acknowledges, both these schools were established after Title VI's enactment. The record in this matter includes no evidence whatsoever that these schools have any history of segregation and have operated on anything but a fully integrated basis and that their supervising boards, which are wholly separate from Louisiana's four higher education boards, have discriminated in any fashion against minorities.

The sole arguments in the record for including BPCC and SBPCC within the reach of any desegregation plan appear in plaintiff's unopposed, unverified November 1980 motion to add BESE, the two parish school boards, and the superintendents thereof as defendants to the action. Plaintiff alleges that the two schools are "traditionally white" institutions and that their joinder is necessary "to undertake a statewide approach in disestablishing dual higher education systems." [84] These allega-

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[84] Memorandum of the United States in Support of Motion to Add Parties Defendant and for Leave to File Amendment Complaint, at 7 (citing *Richardson v. Blanton*, 597 F.2d 1078, 1086-87 (6th Cir.),

tions are insufficient to defeat the summary judgment motions for these two schools.[85] First, while the Civil Rights Restoration Act enlarged Title VI to a great extent, the enlargement was not without bounds; Title VI does not permit one school to come within a remedy for another school if the two schools are governed and funded by separate state agencies; whatever the wisdom of a state-wide remedy, the remedy can be no broader than is permitted by the statute providing the remedy. Second, a state-wide approach is only valid to the extent that the schools or their supervising boards are found to have once operated a segregated system.

In sum, because plaintiff has produced no evidence of a genuine dispute of material fact as to either BPCC or SBPCC, the Bossier Parish School Board and BESE are entitled to summary judgment on their motions. Because neither the St. Bernard Parish School Board nor its supervisor has moved for summary judgment, plaintiff may still present evidence at trial of any liability against those two.[86]

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cert. denied sub nom. Tennessee Higher Education Commission v. Geier, 444 U.S. 886, 100 S. Ct. 180, 62 L.Ed.2d 117 (1979); *Adams*, 480 F.2d at 1164; Dep't of Health, Education, and Welfare, *Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education*, 43 Fed. Reg. 6658, 6659 (Feb. 15, 1978)).

[85] *See Celotex Corp. v. Catrett*, 477 U.S. 317, ——, 106 S. Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986); F.R.Civ.P. 56(e).

[86] The Court is aware of the anomaly that may arise if plaintiff later presents sufficient evidence that the St. Bernard Board is liable under Title VI; the Court observes, however, that its grant of BESE's summary judgment is not being made under F.R.Civ.P. 54(b). To the extent that the interests of justice may require as much, this Court may reconsider, upon good cause shown, the summary judgment in favor BESE and the Bossier Board. The Court only emphasizes that the issue as to BPCC and SBPCC is wholly separate from those as to the 20 institutions under the four higher education boards' supervision.

III.

For these reasons, the Court GRANTS plaintiff's motion in all respects except as to the Bossier Parish Community College and the St. Bernard Parish Community College, to which the Court DENIES plaintiff's motion; GRANTS the Bossier Parish School Board's and BESE's motion; and DENIES all remaining motions.

It is hereby ORDERED that a status conference be held before the Court in Judge Schwartz's chambers on Wednesday, August 24, 1988 at 3:15 p.m. for the purpose of discussing the upcoming trial on the issue of remedy.

New Orleans, Louisiana, this 2nd day of August, 1988.

/s/ John Minor Wisdom
United States Circuit Judge

/s/ Charles Schwartz, Jr.
United States District Judge

/s/ Veronica D. Wicker
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA

OPINION AND ORDER

[Filed July 19, 1989]

Before JOHN M. WISDOM, Circuit Judge, and CHARLES SCHWARTZ, JR., District Judge and VERONICA D. WICKER, District Judge

This matter came before the Court for hearing on the parties' objections to the Special Master's Final Report and Proposed Order of May 26, 1989. In addition to reviewing those aspects of the Report and Order challenged by the parties' objections, the Panel reviewed the entire Report and Order independently. To the extent any matters set forth in the Report and Order were based on findings of fact, those findings were reviewed under the clearly erroneous rule. To the extent any matters contained therein were based on conclusions of law, those conclusions were reviewed *de novo*.

In light of the Panel's review and the parties' objections, the Panel rules as follows: The Panel hereby adopts the Final Report and Proposed Order as its own, except to the extent they are modified as stated below.

Thus, the whole of the Master's Report forms the basis of the Court's Order, except where the Panel expressly departs from the Master's findings and recommendations.

Without limiting those of the Master's findings generally adopted by the Panel, the Court directs specific attention to the following extractions from the Master's Report, as modified where necessary:

Louisiana currently has seventeen general state institutions of higher learning, organized under four separate governing boards.[1] The Board of Regents has general responsibility for planning, coordinating and reviewing the budgets and academic program offerings of each state university. Each of the three remaining boards has separate direct management authority for a number of the universities. The Louisiana State University Board of Supervisors ("LSU Supervisors") oversees Louisiana State University and Agricultural and Mechanical College in Baton Rouge ("LSU A&M"), the University of New Orleans ("UNO"), Louisiana State University at Shreveport ("LSU-S"), Louisiana State University at Alexandria ("LSU-A") and Louisiana State University at Eunice ("LSU-E"). The Southern University Board of Supervisors ("Southern Supervisors") oversees Southern University at Baton Rouge ("SUBR"), Southern University at New Orleans ("SUNO") and Southern University at Shreveport/Bossier City ("SUSBO"). The Board of Trustees for State Colleges and Universities ("Trustees") oversees Louisiana Tech University in Ruston ("Louisiana Tech"), Grambling State University ("Grambling"), University of Southwestern Louisiana in Lafayette ("USL"), Northeast Louisiana University

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[1] The findings appearing herein on pages 2-12 are taken from pp. 8-21 of the Speciol Master's Final Report ["Report"]. Throughout this Order, the Master's citations to the statements and depositions of particular witnesses have been omitted, as reference to such sources can be obtained directly from the Master's Report.

in Monroe ("Northeast"), Northwestern State University in Natchitoches ("Northwestern"), Southeastern Louisiana University in Hammond ("Southeastern"), McNeese State University in Lake Charles ("McNeese"), Nicholls State University in Thibodaux ("Nicholls") and Delgado Community College in New Orleans ("Delgado").

Of these institutions, LSU-A, LSU-E, SUSBO and Delgado have only two-year programs. Additionally, SUNO maintains a number of two-year programs as well as four-year programs. Two other public community colleges—Bossier Parish Community College and St. Bernard Parish Community College—are separately managed by the State Board of Elementary and Secondary Education and are no longer defendants in this case, having been granted summary judgment in the Court's August 2, 1988, ruling. *See United States v. Louisiana*, 692 F. Supp. 642, 658-59 (E.D. La. 1988). There is not, however, any statewide system of community colleges and a number of regions in the state—most notably the state capital of Baton Rouge—have no two-year community college.

The remaining schools listed above have four-year undergraduate programs and varying programs for graduate studies. Three state professional schools are also organized under the same three management boards. The Louisiana State University Medical Center, located in New Orleans and Shreveport, and the Paul M. Hebert Law Center, located in Baton Rouge, are overseen by the LSU Supervisors. The Southern University Law Center, also in Baton Rouge, is overseen by the Southern Supervisors. Finally, LSU has a separate Agricultural Center in Baton Rouge, overseen by the LSU Supervisors.

The current governing structure for state universities was created as part of a revision of the Louisiana Constitution in 1974. Prior to 1974, statewide coordination

was provided by the Louisiana Coordinating Counsel for Higher Education, itself created in 1968, which had more limited powers than the current Board of Regents. Most of the state universities were governed by the State Board of Education at that time, although the Louisiana State University Board of Supervisors separately governed the LSU schools. The 1974 constitutional revisions divided the direct governance for state universities into the three current governance boards and gave the Regents enhanced, though not complete, control over budgetary and program matters.

As the Court's August 2, 1988, opinion discusses, four state universities—SUBR, SUNO, SUSBO and Grambling—were originally established as institutions for blacks only. 692 F. Supp. at 647. The remaining four-year state universities were established for whites only. It was not until some time after the enactment of the Civil Rights Act of 1964 that the State of Louisiana discontinued official recognition of state universities as single race institutions. However, with respect to most schools, de facto racial identifiability has continued to the present. The chart below (updating the chart provided in the Court's August 2, 1988, opinion, 692 F. Supp. at 645) notes the enrollment at each institution, by race, comparing 1981, the year the consent decree was implemented, with 1988.

Enrollment at Louisiana Public Universities By Race, 1981 and 1988

University	1981					1988				
	Black		White		Total	Black		White		Total
Trustees	#	%	#	%		#	%	#	%	
Delgado	3,371	40.1	4,348	51.7	8,404	2,257	31.5	4,268	59.6	7,161
Grambling	3,777	98.5	44	1.1	3,834	5,626	95.8	225	3.8	5,870
Louisiana Tech	1,194	11.6	8,489	82.5	10,288	1,236	12.7	7,186	73.7	9,751
McNeese	1,062	15.3	5,706	82.2	6,943	1,004	13.8	6,156	84.3	7,300
Nicholls	1,068	15.0	5,954	83.6	7,119	819	11.5	6,180	86.6	7,139
Northeast	2,431	22.0	8,544	77.2	11,071	1,539	15.1	8,461	83.0	10,193
Northwestern	1,296	19.4	4,448	66.6	6,682	1,258	19.5	4,768	74.1	6,438
Southeastern	1,112	12.6	7,633	86.2	8,854	577	6.7	7,868	91.7	8,582
USL	2,380	17.4	10,931	79.8	13,702	2,478	17.5	11,200	79.2	14,143
LSU Supervisors										
LSU-A	151	9.9	1,357	88.8	1,528	214	9.7	1,949	88.6	2,201
LSU-A&M	1,688	6.3	22,832	84.7	26,964	1,906	7.5	22,259	88.0	25,296
LSU-E	237	15.5	1,283	84.0	1,528	242	13.9	1,483	85.1	1,743
LSU Law School	16	1.9	830	96.1	864	30	3.8	746	94.9	786
LSU-S	315	7.6	3,803	91.5	4,155	381	8.5	3,991	88.9	4,490
UNO	2,491	16.1	11,519	74.6	15,432	2,439	15.5	12,053	76.5	15,752
Southern Supervisors										
SUBR	7,655	86.4	288	2.6	8,855	8,267	92.7	398	4.5	8,921
SUNO	1,994	82.4	11	0.5	2,420	3,130	83.9	436	11.7	3,731
SUSBO	661	99.8	1	0.2	662	1,118	89.7	122	9.8	1,246
Total	32,899	23.6	97,961	70.3	139,305	34,521	24.5	99,749	70.9	140,743

As the chart illustrates, the racial identifiability of Louisiana's state universities is especially evident in the coexistence of predominantly black institutions (PBIs) and predominantly white institutions (PWIs) in close geographic proximity in four areas of the state. In New Orleans, SUNO currently has 83.9 percent black and 11.7 percent white enrollment, while UNO has 15.5 percent black and 76.5 percent white enrollment. In Baton Rouge, SUBR has 92.7 percent black and 4.5 percent white enrollment, while LSU A&M has 7.5 percent black and 88.0 percent white enrollment. In the Shreveport/Bossier City area, SUSBO has 89.7 percent black and 9.8 percent white enrollment, while LSU-S has 8.5 percent black and 88.9 percent white enrollment. Finally, in Lincoln Parish, Grambling has 95.8 percent black and 3.8 percent white enrollment, while Louisiana Tech, in nearby Ruston, has 12.7 percent black and 73.7 percent white enrollment.

The governing boards of these universities are also racially identifiable. The Board of Regents currently has sixteen members, thirteen (81 percent) of whom are white and three (19 percent) of whom are black. Of the eighteen LSU Supervisors, fourteen (78 percent) are white and four (22 percent) are black. The Southern Board of Supervisors has four white (22 percent) and fourteen black (78 percent) members. The Trustees are the most integrated of the four boards, with thirteen of eighteen members (72 percent) white and five members (28 percent) black. According to the most recent data available, the total population of the State of Louisiana is 4.5 million, 69 percent white and 29 percent black.

Given the racially identifiable membership of the Board, none, including the Southern board which vigorously seeks to preserve its separate identity, is an exponent of racial integration. Retaining such vestiges of segregation is not an appropriate solution to the problems before this Court, and it can never be forgotten that this

case is about the integration of all of Louisiana's institutions of higher education.[2]

A truism thus emerges: The present scheme for governing education in Louisiana—three operating boards and one coordinating board—has perpetuated illegal segregation in Louisiana's higher education, even though the system's creation postdates the filing of this case. The system of multiple boards is therefore a defect in the state's system of higher education that violates the federal constitution. In addition, the scheme almost guarantees a standoff between two "systems" (LSU and Southern) and the rest of higher education. The strongest argument of those favoring the present multi-board system is that the structure of higher education in Louisiana is irrelevant to the goals of desegregation and therefore it ought not be changed.[3] As stated above, the Panel rejects this argument outright.

Statistics regarding student performance, discussed below, demonstrate additional particular constitutional defects inherent in and perpetuated by Louisiana's present system of higher education.

According to the statewide student profile compiled by the Board of Regents (SSPS), in the fall of 1988 only 27,146 freshmen enrolled in state universities, but given past patterns, most of them will not graduate. Dr. Tremblay, Coordinator of Research and Data Analysis, Board of Regents, submitted a chart which analyzed the status of students after six years who entered as freshmen in fall 1982. It shows the graduation rates for each of Louisiana's seventeen universities over the six-year period:

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[2] See Report, p. 53.

[3] See Report, p. 48.

Graduation Rates at Louisiana Public Universities, 1982 to 1988

Institution	Number Enrolled Fall 1982	Graduated by Spring 1988 Number	Percentage
Trustees			
Delgado	705	106	15.0
Grambling	674	287	42.6
Louisiana Tech	1,644	761	46.3
McNeese	1,285	330	25.7
Nicholls	1,398	477	34.1
Northeast	1,580	534	33.8
Northwestern	745	258	34.6
Southeastern	1,695	546	32.2
USL	2,310	788	34.1
LSU Supervisors			
LSU-A&M	4,486	2,103	44.9
LSU-A	421	88	20.9
LSU-E	270	89	33.0
LSU-S	464	110	23.7
UNO	1,931	364	18.9
Southern Supervisors			
SUBR	1,294	328	25.3
SUNO	352	30	8.5
SUSBO	216	24	11.1
TOTAL	21,470	7,133	33.2

As the chart shows, no state university in Louisiana graduated half of its enrollees within six years, and six institutions failed to graduate even one quarter of their enrollees. Overall, of the 21,470 students who enrolled as first-time freshmen in the fall of 1982, only 7,133 or 33.2 percent had graduated by the spring of 1988, six years later. The national average for public universities is 44.9 percent graduated over six years. *See* American Council on Education, Digest of Education Statistics 249

(1988) (percentage of students entering in 1980 who graduated within the following six years).

The overwhelming majority of students enrolled in state universities in Louisiana are state residents. According to Board of Regents SSPS data, of first-time freshmen in the fall of 1988, 90.3 percent were Louisiana residents and 9.7 percent were nonresidents. Moreover, 58.5 percent of the first-time freshmen in this sample entered a university in their home parish or in a parish adjacent to their home parish, while 41.5 percent ventured further from contiguous parishes to attend college within the state.

In addition, black students and PBIs account for a much greater percentage of non-resident students and students from non-contiguous parishes than do white students and PWIs. For instance, of the 2,627 non-resident students enrolling as first-time freshmen in fall 1988, 1,539 (58.5 percent) were black and 1,401 (53.5 percent) went to PBIs. By comparison, blacks made up only 28.0 percent of the total entered students. PBIs clearly attract more non-resident students and students from distant parishes within the state than do PWIs. In the fall of 1988, 33.7 percent of students at PBIs were non-residents and 63.4 percent came from non-contiguous parishes, while only 5.3 percent of students at PWIs were non-residents and 37.6 percent came from non contiguous parishes. Non-resident black students are also far more likely to go to PBIs than are resident blacks. Overall, 52.7 percent of black students entering in the fall of 1988 went to PBIs, but the rate was 88.2 percent for non-resident blacks attending PBIs as compared to 43.6 percent of resident blacks.

In fact, in 1988 only one state university, Grambling, a PBI, attracted more than half (55.4 percent) of its student body from out of state. Thus, Grambling is a "national" university in terms of the residences of its

students, with California supplying the largest number of students after Louisiana. By comparison, at LSU A&M, Louisiana's "flagship" university, only 8.4 percent of its student body came from outside the state.

The relative college preparation level and college-going rates for black and white high school students in Louisiana further define the segregation problem confronting Louisiana education. According to date compiled by the Louisiana State Department of Education, there were 46,222 high school graduates in 1988, 15,018 (32.5 percent) of whom were black and 30,126 (65.2 percent) of whom were white. Of these 1988 graduates, 38,844 (84.0 percent) came from public high schools and 7,378 (16.0 percent) came from private high schools. Public high school graduates were disproportionately black (36.7 percent black/60.9 percent white) while private high school graduates were disproportionately white (10.4 percent black/87.5 per cent white). Viewed another way, 5.1 percent of black students graduated from private high schools, whereas 21.4 percent of white students graduated from private schools. This disparity is especially pronounced in certain areas, like Orleans Parish, where 83.9 percent of blacks go to public high schools but 90.0 percent of white students go to private high schools.

College-going rates in Louisiana are also much higher for white students than for black students. In 1988, 17,816 of the total 46,222 graduating high school students in Louisiana (38.5 percent) went to college but blacks accounted for only 4,263 of these college-going high school graduates, yielding a college-going rate for blacks of 28.4 percent. By contrast, whites accounted for 12,647 college entrants, yielding a 42.0 percent college-going rate for whites. This disparity in college-going rates has remained relatively constant in recent years. Five years ago, for instance, in 1983, the college-going rate for blacks was 29.2 percent and the college-going rate for whites was 42.5 percent.

Of those students who attend state universities in Louisiana, whites are much better prepared than blacks. According to 1987-88 data from the American College Testing Program (ACT), the mean high school grade point average (GPA) for all public college attendees was 2.75. The mean GPA for blacks, however, was 2.54 while the mean GPA for whites was 2.80. Likewise, the mean ACT score for blacks was 12.74 compared to an 18.67 mean ACT score for whites. This disparity in preparation is also reflected in the percentage of first-time freshmen in state universities who are enrolled in "developmental" (*i.e.*, remedial) education courses. According to Board of Regents data, in the fall of 1988, 12,897 (48.0 percent) of all first-time freshmen were enrolled in remedial courses, but the rate for black students (71.7 percent) was much higher than the rate for white students (38.5 percent).

The Louisiana system of public higher education is faced therefore with a lower college-going rate than the national average and a lower preparation level on average, with black students in each case being behind white. In what was formerly a dual system of higher education, the PBIs still educate over 50% of the black students who enter higher education. The Court's concern which led to the appointment of a Special Master was precisely that during the period of the consent decree from 1981 to 1987, while more black students entered higher education, the percentage of black students educated at PBIs versus PWIs increased. Thus, racial separation in higher education in Louisiana remains unresolved.

Given the disparate racial compositions of the student population at schools in close proximity, such as LSU A&M-SUBR in Baton Rouge, Grambling-Louisiana Tech in Ruston, UNO-SUNO in New Orleans, and LSUS-SUSBO in Shreveport, the merger of institutions has

been considered. However, merger presents many problems without any sure benefits of desegregation.[4] Among the problems are merging student bodies of highly disparate academic backgrounds, potential loss of qualified faculty and administrators who were attracted to a school because of its academic characteristics and goals, and undermining black institutions such as Grambling and Southern with substantial alumni following.[5] Thus, under the circumstances, an opportunity must be given for Grambling and Southern to make every effort to integrate before extreme solutions are considered. Therefore, as the Special Master recommends, the merger remedy is generally reserved at this stage [6], with the exception of desegregation of legal education, which as discussed below, presents unique considerations in the Panel's view.

Notwithstanding this Court's recognition of the historical importance of PBIs and its attendant refusal to order a merger remedy at this juncture, the focus of this litigation is not institutions but students.[7] *See* State of Louisiana Post-Trial Memorandum, at 35-37; *United States v. Alabama*, 791 F.2d 1450, 1455-56 (11th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987) (state universities cannot assert fourteenth amendment rights against the state). In 1988, 53 percent of Louisiana black entering freshmen were enrolled in PBIs and 47 percent in PWIs. This percentage of black students attending PBIs slightly exceeds that of 1981 when the consent decree began and indicates the failure of the consent decree ap-

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[4] Report, p. 37 & n.4.

[5] *Id.* at pp. 36-37.

[6] *Id.* at p. 35.

[7] The matters appearing on pp. 13-14 herein are taken from Report, pp. 40-41.

proach. Nevertheless, the opportunities for blacks in Louisiana higher education are clearly tied to the entire state higher education system. Any desegregation plan should seek to increase the number of Louisiana blacks who attend college, which is below the national average, as well as to integrate the existing institutions, especially PBIs, whose percentage of other race students is below that of the PWIs. Over time, the challenge is to render the very terms PBI and PWI anachronistic.

The PBIs have developed attractive programs for black students, as reflected in the number of out-of-state black students. But education of out-of-state students (white or black) should not be a priority of institutions in a state where the college-going and graduation rates of whites and blacks are so low, especially if tuition levels are set so that in-state students subsidize out-of-state students. On the other hand, high out-of-state ratios indicate the popularity and reputation the PBIs have earned.

The more troubling implication is that the PBIs, while requesting additional money for enhancement, may be more intent on preserving their mission of serving black students than on expanding opportunities for white students. The experience of the consent decree confirms that enhancement of PBIs without more simply makes PBIs more attractive to black students, without attracting white students. The focus of the Court's remedial plan, however, must be on improving the ability of PBIs to educate both black and white students. Preserving Southern and Grambling for their educational importance means preserving them as institutions for all Louisiana citizens, not just for black students.

The evidence also suggests Louisiana's multi-board arrangement has led to unnecessary and costly program

duplication.[8] The import of this finding is that the single board solution pos- its a relationship between efficiency and desegregation, particularly to the extent program duplication results from the multiboard structure in Louisiana. It is critical to the success of integrating the historically black institutions that they be upgraded and given desirable programs in order to attract a significant number of white students. Only by creating an organizational structure with the power to make program decisions statewide can these efforts be achieved. Inefficiencies also suggest the dissipation of scarce resources for

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[8] See *id.* at p. 49, citing Witness Statement of Roy McTarnaghan, Vice President for Academic Affairs for the University of Florida System, pp. 17-18, which charts program duplication in Louisiana as compared to Florida:

Comparison of Selected Bachelor's Degree Programs Offered and Degree Productivity: Florida and Louisiana Recent Five-Year Analysis

	Florida Programs Offered	Florida Average Degrees Per Yr.	Florida Degrees/ Programs Per Yr.	Louisiana Programs Offered	Louisiana Average Degrees Per Yr.	Louisiana Degrees/ Programs Per Yr.
Horticulture	2	29	14.6	6	12	2
Animal Science	2	57	28.5	10	84	8.4
Architecture	2	116	58	4	139	35
Journalism	3	178	59	9	91	10
Speech Correction	4	84	21	11	72	6.5
Business Education	6	67	11	13	72	5.5

higher education which, given the difficult fiscal times Louisiana is facing, can only further impair the state's ability to enhance its historically black institutions.[9] Thus, program duplication is highly relevant to desegregation.

The size of a single board is also a matter of interest.[10] Size bears on effectiveness and effectiveness obviously relates to the leverage the single board must assert to achieve desegregation. If a board is too large, its members will lack the necessary involvement. On the other hand, if the board is too small, it can be dominated by a few strong views. *See* Kerr and Gade, *The Guardians: Boards of Trustees of American Colleges and Universities* (forthcoming 1989) (where these factors are discussed and a minimum size board of nine to eleven is recommended).

As previously indicated,[11] the three operating boards in Louisiana each have eighteen members, broken down by race as follows: LSU Board of Supervisors (fourteen white/four black); Southern University Board of Supervisors (four white/fourteen black); Board of Trustees (thirteen white/five black). The Board of Regents has sixteen members (including one student), three of whom are black. Under the circumstances, the size of the single board proposed by the Task Force of seventeen members (including one student) seems reasonable from the point of view of effectiveness.

However, the Panel specifically rejects the Special Master's finding that desegregation necessitates a conscious effort to place a quota of blacks on the new board in excess of the percentage of blacks in the population. The new board members must be chosen on the basis of their qualifications, with emphasis upon each board mem-

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[9] See Report, pp. 51-52.

[10] The matters appearing on pp. 16-17 of this Order are taken from Report, p. 54.

[11] See p. 6, *supra*.

ber's own educational background; his or her experience in teaching or education administration; and his or her commitment to the implementation of this Order. However, emphasizing qualifications does not diminish the impropriety of purposefully excluding black representation on the new board, and although no quota is ordered, the new board's racial composition must be consistent with the findings and directives of this Order.

With regard to the structure of a proposed remedial system and the roles of the particular institutions within the system, there is no obvious and necessary connection between organization and desegregation.[12] However, a strong correlation between classifying and tiering public institutions and desegregation may surely be inferred from structuring higher education to enhance quality while ensuring minority students participate at all levels. A system producing better educated students benefits all concerned.

In formulating that aspect of a remedy bearing upon classification of institutions, no party contests establishing LSU as a flagship university with selective admissions standards.[13] The plans also suggest a second tier of institutions, labelled "doctoral" institutions according to generally accepted national classification schemes.[14]

The remaining four-year institutions may be labelled "comprehensive." [15] As a rule, these institutions should not offer doctoral programs.[16] They are: Grambling,

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[12] *See* Report, p. 65.

[13] *Id.* at p. 64.

[14] *Id.* at pp. 66-67.

[15] *See id.* at p. 69 & n. 12. This term is adopted from the State/Task Force plan.

[16] *See id.* at pp. 69-70. Several institutions that would be classified as comprehensive universities currently offer discrete doctoral degree programs. For instance, Grambling offers a doctoral degree in developmental education, Northeast offers a Ph.D. in Pharmaceu-

LSU-S, McNeese, Northeast, Northwestern, Nicholls, Southeastern and SUNO. While the Southern Plan proposes further tiering among these institutions, there seems to be general agreement by the parties with their missions as they now stand. The board and President should explore the necessity for further tiering among these schools in due course, having in mind resource constraints as well as racial balance. The very purpose of tiering is to reduce duplication, not to encourage it.[17]

Tied to the tiering of institutions is the imposition of selective admissions standards. Central to the Special Master's analysis of selectivity and tiering is LSU's recent experience with the imposition of a modest selectivity program.[18] The testimony before the Special Master shows that relatively modest admissions standards (course work requirements but no rank in class or ACT minimum) served to produce better prepared applicants for admission, in effect forcing high schools to respond to the preparation challenge. And more importantly, the number of black students entering LSU was not lessened; Board of Regents data show that 8.2 percent of the 1988 entering class was black, which actually marks a small increase over the historical percentage of black students at LSU.

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tical Science and SUNO offers a Ph.D. and Ed.D. in Special Education. Grambling and Northeast have been especially vocal in arguing these programs be maintained notwithstanding any reclassification or clarification of their school's mission. (*See, e.g.*, Proposed Amendments to Recommended Remedial Plan from the Grambling Alumni, at 1-4; State of Louisiana Suggested Amendments to Recommended Remedial Plan, at 3.) Such programs, like all others, must be studied by the new board. So long as they are educationally sound and consistent with the desegregation goals of this plan, discrete doctoral programs need not be eliminated solely to conform to the school's new categorization.

[17] *Report* at p. 70, citing Chart set forth herein on p. 15, n. 8 *supra*.

[18] *See Report*, pp. 71-73.

The current practice of open admissions to all four-year institutions is counter-productive, both in terms of educational objectives and racial integration. The objective is not simply to admit students into college, but to educate and graduate them. In terms of undergraduate degree productivity, the Louisiana open admissions system is a failure.[19] As previously discussed,[20] system-wide only 33.2 percent of the students who entered higher education in Louisiana in 1982 had received bachelors and associates degrees after six years of attendance, far below the national average of 44.9 percent for public universities.

Thus, with an open admissions system, students enter higher education (both four and two years) easily, but do not readily leave with degrees. Moreover, the problem is particularly acute at institutions with a large black population, notably SUNO.

The Special Master's recommendations regarding the tiering of institutions included the creation of a community college system.[21] Louisiana has never embraced community colleges as an integral part of its higher education system and as a result, its community colleges are

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[19] *See id.* at p. 72. Given that almost 50 percent of the entering students need remedial (developmental) education, degree productivity will not be high. *See id.* at p. 75 & n. 17, citing Tremblay Hearing Exhibit 2, which shows that 48 percent of fall 1988 four-year college students needed developmental education. The figure was 77 percent for black students. Interestingly the percentage of those needing developmental education was also 48 percent for students at two-year colleges, suggesting that four-year schools provide as much if not more remedial education than two-year schools. This also points to a hidden cost of the open admissions system which fails to organize students by academic ability. It creates program inefficiencies since all of higher education must devote resources to developmental education.

[20] See pp. 7-9, *supra* and Tremblay Chart.

[21] Four community colleges are defendants in this case: Delgado (New Orleans); LSU-Eunice; LSU-Alexandria; and Southern-Shreveport. Their total enrollment is about 12,000 students of whom about 3,800 or 32 percent are black.

relatively undeveloped as an educational resource.[22] Louisiana ranks 48th among states in the number of higher education institutions in relation to college age population largely because of the paucity of community colleges. Moreover, community colleges serve a non-traditional age population largely unserved in Louisiana, even though Louisiana has a very low high school completion rate which accentuates the need for lifelong learning. Community colleges are also necessary to insure remedial education of those who might be excluded from the less accessible four-year college system, thereby helping to ensure a racially balanced system.[23] A system created from among the existing independent community colleges would have had 12,351 students in 1988, of whom 31 percent were black.[24]

The Special Master expressed trepidation in reclassifying SUNO, with its extraordinarily low productivity as a four-year liberal arts university.[25] Nevertheless, SUNO's two-year role has been no more successful than its four-year mission. Moreover, SUNO's two-year offerings overlap with Delgado's, whereas SUNO will be the only open admissions four-year university in New Orleans, once UNO adopts selective admissions. If the reorientation is conscientiously pursued by the board and the SUNO administration, creating this new niche for SUNO may lead to improved degree productivity. The new board should, therefore, review SUNO's two-year degree offerings and either terminate them or transfer them to Delgado.

Against this background, the new system of higher education proposed by the Special Master and adopted by the Panel may be diagrammed as follows: [26]

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[22] *See* Report, pp. 82-83.

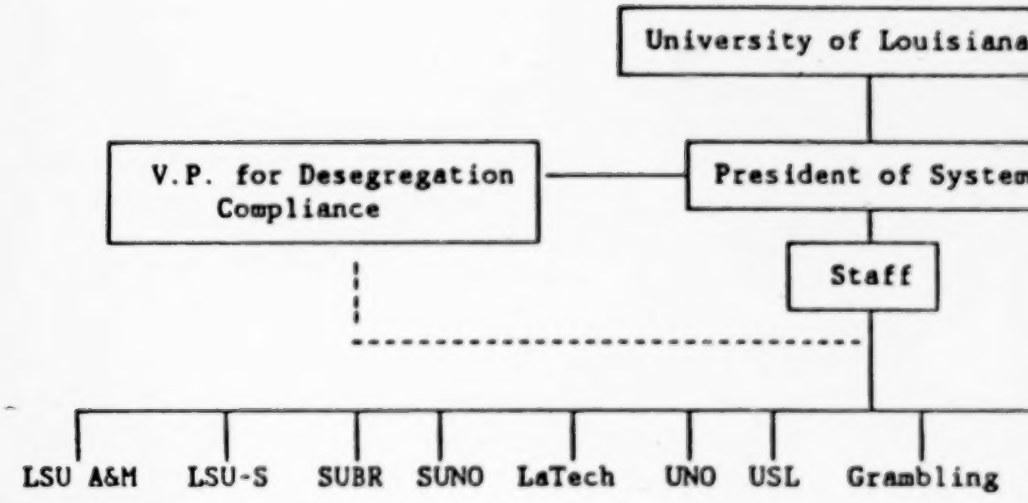
[23] *See id.* at p. 84.

[24] *Id.*

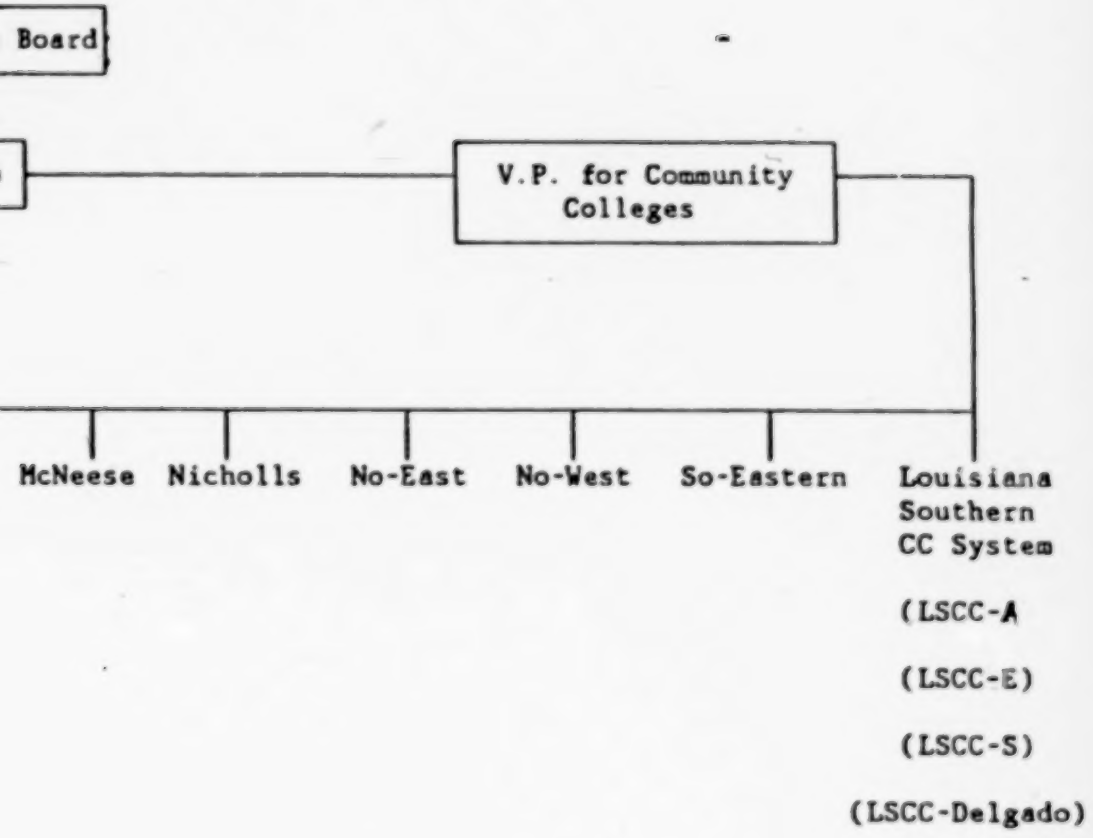
[25] *See id.* at pp. 89-90.

[26] *See id.*, pp. 91-92.

Organization of Proposed Uni



versity of Louisiana System



The minimization of program duplication is an essential aspect of the Special Master's proposed reorganization of the school system. The evidence demonstrates there is more program duplication in Louisiana than is desirable from the point of view of educational efficiency.[27] Dr. McTarnaghan shows how Louisiana has more degree programs in many areas than does Florida, even though Florida is a much larger system and state.[28]

McTarnaghan attributes much of this program duplication to the lack of a single board with adequate authority to initiate or terminate programs. He notes excessive duplication costs money and renders the programs less viable from a qualitative perspective. Moreover, McTarnaghan also suggests duplication permits schools to cater to students of one race, thereby hindering desegregation goals. Other witnesses, notably Clifton Conrad,[29] confirm program duplication is excessive in Louisiana and that it fosters racially identifiable schools.[30]

There is accordingly no doubt in the Court's mind that duplication of programs can have a stultifying effect on desegregation. Therefore, the board must take as one of its first missions the reduction of duplicated programs, especially where they involve proximate institutions.[31]

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[27] *See id.* at, p. 93.

[28] *See* chart in note 8, p. 15, *supra*.

[29] Conrad testified on behalf of the United States. He is a Professor of higher education at the University of Wisconsin.

[30] See Report, p. 94 & n.25.

[31] *See* Report, p. 95. To some extent, this assignment is tied to the tiering proposal the board must also implement. However, tiering involved primarily graduate level programs and much of the duplication currently exists at the undergraduate level. (*See* McTarnaghan table in note 8 *supra*.) In terms of the desegregation data in this case, undergraduates are a critical aspect. The number of students involved is far larger and the impact of enrollment choice is likely to be more pronounced.

In the cataloguing the problems associated with unwarranted duplication of programs, legal education in Louisiana looms large. There are two state supported law schools in Louisiana, Southern Law Center and the LSU Paul Hebert Law Center, both located in Baton Rouge. In terms of racial identifiability and academic achievement, they present remarkably different pictures. Southern Law Center is desegregated, with a student body 58 percent black and 42 percent white and a faculty (including part-time) which is virtually 50/50. LSU Law Center on the other hand has a minuscule percentage of black students. During the period of the consent decree, it ranged from 1.9 percent to 0.8 percent. In 1988, it was only three percent.[32] Moreover, the Louisiana bar passage rate at LSU Law Center has averaged about 90 percent over the last five years, whereas at Southern Law Center it is under 50 percent. LSU Law School is a more successful law school from that perspective,[33] but Louisiana blacks are largely educated at the inferior school. Yet, competitive, quality legal education for blacks is particularly important because the ratio of black lawyers to the black population is very low, and law degrees are often recognized as an access point to political and economic power.[34]

Thus, the Panel perceives the focal issue concerning legal education to be different from the issue identified by the Special Master.[35] The issue is how to desegregate legal education overall, not just LSU. Unlike the other Louisiana institutions, the two law schools have identical programs and exist virtually side by side. Moreover, the programmatic difficulties of institutional merger in the university context generally are greatly lessened in this

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[32] *See* Report, p. 96.

[33] *See id.* at p. 97.

[34] *See id.* at p. 96.

[35] See *id.* at p. 96.

instance since both institutions award only a single degree (J.D.).

LSU Law Center's low percentage of blacks seems to be a function of an admissions policy that makes no effort to attract black applicants, since it is significantly below the percentage of black undergraduates at LSU-A&M and the number of blacks at the state's two private law schools.[36] Moreover, those few blacks who do graduate from LSU Law School succeed in passing the bar (of the eighteen black students at LSU since 1982-83, none has failed the bar). Affirmative action programs setting goals like the new admissions standards at LSU-A&M are an appropriate place to begin the desegregation of legal education. A ten percent category of admissions exceptions whose purpose is to increase the diversity of LSU Law School and the number of black graduates is appropriate and should be immediately implemented for the 1990-91 school year. LSU should also offer substantial scholarships to black students and undertake vigorous recruitment efforts aimed at black students.

However, as long as the two institutions of disparate quality exist, the State will continue to produce a secondary class of lawyers unable to compete fully in the professional context. Given the racial composition of the two schools, the negative impact of this disparity will fall largely upon the black law student population, and given the consent decree experience, a simple provision of funds will not resolve this problem, even assuming such funding is a realistic possibility.

Thus, over the next five years, the Board must develop a plan for merger of the two schools; a gradual merger over a five year period of time will minimize the necessary adjustment by the students, administration, and faculty and the impact of curriculum change. Duplication of programs should be gradually eliminated and

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[36] *See id.* at pp. 97-98.

new admissions standards for the single Law Center evaluated, with continuing provision for a special category of admissions at no lower than ten percent. New admissions standards should also be prepared with a view towards ensuring that the merger of the two institutions does not disproportionately burden the black law student population, even though the Panel envisions the imposition of more stringent admissions standards at the new merged law school than are presently imposed at Southern.

The Court also declines to adopt as a remedy any order that specific dollar amounts of operating expenses or capital to be spent on enhancement of existing institutions.[37] Nonetheless, the new board must make provision for such funding as is necessary to implement the program transfers ordered herein and any other new programs the single board orders, whether such funding be referred to as "enhancement," as the Special Master stated, or otherwise. Determination of specific dollar amounts requires carefully drawn budgets not made a part of the record in these proceedings. The president of the system and his or her staff must calculate the funds needed for operating purposes and expend them properly.

Since the necessity for higher education budget cuts has yet to be determined, the most that need be said now is that all cuts as well as increases must be made consistent with the desegregation goals of this plan. At a minimum, funding reductions should not disproportionately affect black students or the PBIs and existing funding for those PBI enhancement programs successful in attracting substantial other race students should be protected from budgetary ax.[38]

A final remedial measure recommended by the Master and adopted by the Court is monitoring of the actions

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[37] *See id.*, pp. 104-05.

[38] *See id.*, p. 107.

taken by the state to implement this Order. The need for a monitoring function is premised largely upon the Court's continuing jurisdiction over this case, and some form of monitoring is necessary to aid the Court in the exercise of its jurisdiction. The remedies discussed herein place most of the responsibility for compliance upon the state and its institutions, where responsibility should lie if desegregation is to become a reality for Louisiana. The single board and its chief executive are given extensive powers to end the racial identifiability of Louisiana higher education. At the same time, of necessity much of the impact of this remedy is to be felt in the future. Thus, it is difficult to argue that the system should be released from oversight by the Court at this stage. A period of review, over five years, is the only prudent way to assure the implementation of the remedies proposed.[39]

Thus, pursuant to the Special Master's Final Report as modified above and consistent with the Court's prior orders, it is specifically ORDERED as follows:

Single Governing Board

1. Within 30 days of the entry of this Order, the four boards currently governing public higher educaiton in Louisiana shall be disbanded and their powers consolidated into a single state governing board. The new board ("board") shall be given ultimate authority over academic, budgetary, personnel and administrative affairs of each of the public institutions currently overseen by the Board of Trustees, the Southern Supervisors and the LSU Supervisors. Additionally, the board shall be given the special mission of monitoring and implementing the remedial Order of the Court and of insuring that progress toward eliminating Louisiana's racially dual education system is achieved. The board shall determine an appropriate name for the new coordinated system of

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[39] *See id.*, p. 112.

higher education, such as the "University of Louisiana System." [40]

2. The board shall have seventeen voting members and one student member. The board shall elect a chair from among its members on an annual basis. The voting members shall be appointed by the Governor and confirmed by the Louisiana Senate.

Board members shall have staggered terms of five years and reappointment for one additional term shall be permitted. The initial terms shall be for three, four or five years in order to permit the staggered system to begin. These terms shall apply to six, six and five members, respectively.

The board members appointed pursuant to this Order shall include three persons chosen from the present Board of Regents, with one person to hold a three year appointment, one a four year appointment and one a five year appointment; two persons chosen from the present LSU Board of Supervisors, with one person to hold a four year appointment and one person to hold a five year appointment; two persons chosen from the present Southern Board of Supervisors, with one person to hold a four year appointment and one person to hold a five year appointment; and two persons chosen from the present Board of Trustees, with one person to hold a four year appointment and one person to hold a five year appointment.[41]

In making appointments to the board, the Governor shall not only select persons with established skills and

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[40] The names and titles used in this order are only suggestions; the board is free to craft different names or titles so long as they are otherwise consistent with the remedial goals of this plan.

[41] Once these appointments are made, there will remain five more members to be appointed for three year terms; two more members to be appointed for four year terms; and one more member to be appointed for a five-year term.

experience in higher education, but shall also select persons firmly committed to the desegregation goals of the Court's Order and the Court's methods for implementing the Order. Additionally, board members shall be selected to broadly represent the racial, ethnic, gender and geographic diversity of the state.

3. For the first five years, while the remedial provisions of the Court's Order are being implemented, the Court shall reserve the right to veto the composition of the board, if the board's composition does not adequately take into consideration the goals of this Order or does not work to ensure participation by Louisiana's black citizens. In addition, the board shall appoint one student member on an annual basis, pursuant to a procedure established by the board. A black student frequently should be appointed.

4. The board shall be charged with appointing a full-time president. This person shall have an established and extensive background in higher education governance, and a sensitivity to the educational needs of racial minorities. The president shall serve at the pleasure of the board and be delegated operational authority over the university system.

5. There shall be a substantial administrative staff to support the new president, which will utilize the personnel and resources of the Board of Regents and the three operating boards, as appropriate. The president shall have the responsibility to recommend to the board appointment and, if necessary, removal of chancellors of each of thhe system campuses. Additionally, a special vice-president for desegregation compliance, whose mission is to oversee implementation of the Court's plan, shall be appointed by the board upon the recommendation of the president. This special vice-president shall be responsible for developing and implementing other desegregation proposals approved by the board; for compiling

data on all aspects of desegregation in Louisiana public higher education; and for reporting to the monitoring committee as hereinafter required.

6. Within 90 days after the entry of this Order, the board shall develop and implement procedures for the use of advisory committees at each state university and community college. Among their duties, these committees shall provide advice and assistance to the president and the vice-president for desegregation compliance, as requested. The size of these advisory committees shall be set by the board but shall not exceed 17 members. All state universities shall be encouraged to form such committees which will provide non-binding advice and information about campus life to the board. Like the board, these advisory committees shall be appropriately composed to further the goals of this Order.

Classification of State Universities

7. Within 120 days, the board shall implement a scheme for classifying each state university according to its mission and taking into account its undergraduate, graduate and research programs and the degree of selectivity in admissions. Such classifications shall be consistent with the tiers set forth below and shall be designed to reduce the number of programs statewide. The board shall be especially careful to differentiate the missions and academic programs of proximate PWIs and PBIs.

8. LUS A&M shall be designated by the board as the research university in the state university system and recognized as Louisiana's flagship state institution. It shall continue to have the greatest number of graduate and research programs and shall implement the most selective criteria for admission. LSU A&M's undergraduate admissions shall be limited to the top echelon of graduating high school seniors in light of standards es-

tablished by the board, with selectivity based on criteria discussed below. These selective admissions standards shall be established within 120 days and implemented for the 1990-1991 school year. All remedial education courses shall be eliminated by the 1990-1991 school year.

9. The board shall also designate an intermediate level of state institutions offering significant doctoral and other graduate programs in addition to four-year undergraduate programs. These universities shall be somewhat less selective than LSU A&M, based on criteria discussed below. The selectivity standards shall be developed within 120 days and implemented for the 1990-1991 school year. Like LSU A&M, this group of universities shall have little need for, and thus by the 1993-1994 school year, no remedial education courses. The group of intermediate doctoral institutions shall initially be Louisiana Tech, SUBR, UNO and USL. The board shall be responsible for developing a realistic timetable for SUBR, with the imposition of selective admissions and the development of its doctoral level programs taking no more than three years.

10. The board shall designate the remaining four-year public institutions—Grambling, Nicholls, SUNO, LSU-Shreveport, McNeese, Northeast, Northwestern and Southeastern—as comprehensive universities which will have very limited graduate/research missions and less selective or open admissions. The new board shall within 120 days set the admissions standards for all of these institutions with the exception of Grambling, which standards shall be implemented for the 1990-1991 school year. Care shall be taken to insure that at least some of these institutions move away from open admissions toward some degree of selectivity (which might be the requirement of completing a college preparatory curriculum).

11. With respect to admissions standards for Grambling and Louisiana Tech, the Court hereby adopts as

part of its Order the stipulation of the parties appearing as Appendix B to the Special Master's Final Report, but only to the extent such stipulation and its implementation are consistent with this Opinion and Order.

12. Within 180 days, existing graduate programs at comprehensive universities should be evaluated for continuance. So long as they are educationally sound and foster the desegregation goals of this Order, some discrete, non-duplicative graduate programs may be maintained.[42] Comprehensive universities may retain remedial education programs, especially if they remain open admissions institutions. However, the primary focus for remedial education shall be shifted in the future to the community colleges, which will be solely open admissions institutions.

Selective Admissions Standards

13. The state shall end the traditional system of open admissions to all state universities. Consistent with the classification scheme laid out above, selective admissions requirements shall be developed by the board within 120 days and implemented at selected Louisiana public universities by the 1990-1991 school year. Only five institutions are made selective directly under this Order (and one of them, SUBR, only after three years). The board has discretion to make further selectivity distinctions with the remaining institutions, so long as the admissions standards of the five selective schools designated herein clearly distinguish them from the remaining institutions.

14. State universities shall base admission decisions on some combination of high school grades, high school class rank, high school courses taken, personal recommendations, extracurricular activities, essays or personal statements, interviews and standardized test scores. The precise formulation of the criteria for each institution

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[42] See, e.g., n.16, *supra* p. 18.

shall be approved by the new board. ACT and other standardized test scores provide valuable data. However, they should be used as admissions tools only in conjunction with other high school performance data. Primary emphasis shall be placed on high school grades, class rank and breadth of course work undertaken.

15. Within 120 days, the board shall develop appropriate programs of high school course work that will be required for admission at each institution. In developing these requirements, the board must consult and work with the Board of Elementary and Secondary Education and the state's high schools to insure that resources are put in place to meet demand. New course work requirements must be phased in commencing with the 1990-1991 school year to allow high schools and students a period to adjust and shall be fully implemented by the 1993-1994 school year.

16. Each state institution shall have fifteen percent of its entering class set aside for admissions exceptions. Initially, ten percent shall be used for admitting other race students (that is, black students at PWIs and white students at PBIs), with the remainder available for other institutional interest students such as athletes, students with other talents and alumni children. The precise mechanism for administering the admissions exceptions shall be developed by the president and the campus chancellors but the emphasis shall be fostering integration at each campus. Like selective admissions standards themselves, the admissions exceptions shall be developed within 120 days and implemented for the 1990-1991 school year. The use of a ten percent other race set-aside does not mean that overall ten percent other race enrollment is acceptable. The goal is that each campus substantially increase its proportion of other race students and thus eliminate its racial identifiability; this goal demands more than ten percent other race enrollment.

Comprehensive Community College System

17. The two-year community colleges subject to the Court's Order (LSU-Eunice, LSU-Alexandria, SU-Shreveport/Bossier City and Delgado) shall be reorganized as part of a single comprehensive community college system for Louisiana. The plan for this reorganization shall be completed within 180 days so that the community college system shall be in place by the 1990-1991 school year. All two-year community colleges and vocational schools (including, for example, Bossier Parish Community College and St. Bernard Parish Community College) should be incorporated into this system. The board shall also develop an appropriate name for the new system, such as "Louisiana Southern Community College System."

18. Upon recommendation of the president, the board shall appoint a special vice-president for the community college system who will report to the board through the president. This appointment shall be made within 90 days. The special vice president shall oversee and coordinate the affairs of all community colleges, including the appointment of chancellors at each campus.

19. The community college system vice-president and the president shall insure that, within 180 days, articulation agreements are executed between each of the community colleges and the four-year institutions for the 1990-1991 school year. Such agreements shall be widely advertised and shall provide for transfer of students successfully completing two-year academic degrees, although four-year institutions with selective admissions may adopt selectivity standards in admitting transfer students. The community college system shall also provide vocational and technical education and adult education, but its transfer mission, especially as it relates to minority opportunities, shall be the focus of its efforts at the outset.

20. Community colleges shall retain open admissions standards and shall emphasize remedial education courses. By the 1993-1994 school year, the board shall concentrate remedial education courses in the community colleges, with no remedial courses remaining at four-year universities, with the exception of those comprehensive universities that retain open admissions.[43]

21. By the 1990-1991 school year, the remaining two-year programs at SUNO shall be transferred to Delgado leaving SUNO as the comprehensive four-year institution in New Orleans, with less selective or open admissions. The board shall study whether Delgado's offerings currently meet the demand for community college education in New Orleans and increase Delgado's offerings as needed. Within 180 days the board shall review two-year course offerings at other four-year institutions to determine whether they should be continued or transferred.

22. The board shall study the need for and feasibility of starting new community colleges in the areas of the state where none currently exist. Special attention must be given to Baton Rouge, where a community college will be needed to service local students not able to be admitted at LSU A&M and SUBR, once both have selective admissions. The board shall therefore begin planning for a new college campus in Baton Rouge within the first year.

Program Transfer and Enrollment Management

23. With the exception of LSU Law Center and Southern Law Center, merger and/or closing of existing state universities need not be undertaken at this time. Instead, the board shall implement a system of enrollment management, program review and program transfer to address the problem of program duplication and accompanying waste of resources and segregation. The

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[43] See, para. 12 of Order, p. 35, *supra*.

board shall assign to the president the mission of reviewing all current course offerings. Within 180 days, the president shall recommend appropriate enrollment levels for each academic program and also identify programs not meeting minimal quality standards and recommend that they be eliminated or consolidated with similar programs at other state universities.

24. The board shall then take appropriate action with respect to eliminating, consolidating and setting enrollment levels for academic programs, which shall be implemented by the 1990-1991 school year. The board shall ensure that such action is sensitive to the desegregation goals of this plan. Thus enrollment limits shall be set with an eye toward preventing "flight" of students to same race schools. As an example, enrollment limits at Southeastern shall be used to prevent Southeastern from becoming a "flight" school for white students not gaining admission to LSU A&M or UNO, but who are reluctant to go to SUBR or SUNO.

25. The program transfers agreed upon by Louisiana Tech and Grambling shall be implemented by the 1990-1991 school year. Like other programs, however, these programs are subject to further evaluation by the board and the monitoring committee, and since the Special Master no longer has jurisdiction over this case, any changes in the stipulation's proposals shall be submitted to the board. The details of the Louisiana Tech/Grambling transfers are contained in the stipulation attached as Appendix B to the Special Master's Final Report, which provisions the Court adopts as part of its Order, to the extent such provisions and their implementation are consistent with this Order.

26. By the 1990-1991 school year, the board shall begin implementing the merger of Southern Law Center into the LSU Law Center. To the extent consistent with the required core curriculum at each law school, the board

shall immediately insure that certain high demand course offerings are not duplicated between the State's two public law schools. LSU Law School shall undertake as soon as practicable, but no later than the 1990-1991 school year, vigorous efforts for recruiting blacks, including ten percent admissions exceptions for black students, offering scholarships to prospective black students and appointing a special admissions officer for black students, as described above in this Order.[44]

In implementing this merger, the board shall appoint a chancellor for the new unified Law Center by the 1990-1991 school year who shall work with the board to effectuate merger of faculty and curriculum and re-evaluation of existing admissions standards. In so doing, it is not the intent of this Order to damage the quality of legal education at the LSU Law Center; to require significant lowering of admissions standards; or to require any lowering of academic requirements for those students who do gain admission.

Funding for Implementation of this Order

27. Taken into consideration funds freed by the elimination of duplicative programs, the board, in conjunction with the president and staff, shall develop budgets for the newly reclassified institutions, including non-formula expenditures for improving the quality of PBIs whenever fiscally possible. Capital needs shall be evaluated on a similar basis and priority given to those facilities that will support programs to attract other race students. The board shall complete this task within 180 days in conjunction with the 1990-1991 higher education budget submissions.

Other Race Recruitment and Retention

28. The board shall develop a coordinated program for recruitment and retention of other race students, fa-

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[44] See text, pp. 26-27, *supra*.

culty, administrators and staff at all state universities and professional schools within 120 days, which shall include:

(a) Scholarships for other race students. A program of scholarships designed to attract other race students to both PWIs and PBIs shall be developed by the board. A fixed percentage of each institution's overall operating budget shall be set aside for this purpose by the board upon recommendation of the president. Moreover, the board shall establish a state-wide other race scholarship program.

(b) Other race admissions officers. Each PWI and PBI shall have at least one admissions officer whose sole function is to recruit other race students. Such person shall be charged with developing, coordinating and executing all of the institution's other race student recruitment programs.

(c) Equal opportunity statements. Each institution shall develop a strong, written equal opportunity policy, both as to students and employees. This policy shall be reviewed by the special vice-president for desegregation compliance and approved by the board.

(d) Public information efforts. Under the direction of the board, each affected instituion shall develop and implement significant campaigns for disseminating to prospective students and employees information about each state university, its programs and its equal opportunity policy. Among other things, public information efforts shall include the use of biracial recruiting teams from each PBI and PWI which shall visit high schools in their region and throughout the state, as appropriate.

(e) Developing relationships between high schools and colleges. The board shall identify state institutions particularly situated to benefit from special outreach programs to high schools in predominantly other race areas. Such programs shall be designed to reduce the strange-

ness and alienation students often associate with other race institutions. Programs shall include summer sessions in which high school students live on campus and are familiarized with a university's programs and facilities. A pilot project shall be commenced at Southeastern for the summer of 1990.

(f) Incentives. The board shall set annual integration progress goals for each institution which are demanding yet realistic, and which require roughly equivalent progress at each institution. The board shall develop financial incentives for institutions that meet or exceed their annual goals. Financial rewards might include additional funds for scholarships or approval for new program offerings. Incentives shall increase by the degree to which the goal is exceeded. The board shall also consider employing "reverse incentives" or taxes for institutions which consistently fail to meet their goals.

Monitoring Committee

29. A three-member committee shall monitor progress toward desegregation. The committee shall consist of (1) Paul W. Murrill, (2) Frank E. Vandiver; and (3) Franklyn G. Jenifer. Committee members shall be paid a reasonable per diem and expenses, with Dr. Murrill and Dr. Vandiver's per diem and expenses to be taxed as costs against the State of Louisiana to be allocated to the budgets of the various institutions as the new board deems appropriate. Dr. Jenifer's per diem and expenses will be paid by the United States.

30. The monitoring committee is hereby charged with independently evaluating the progress of the new board and each institution towards specific compliance with this Order and with the overriding desegregation goals set by this Order. Copies of the minutes of all meetings of the new board shall be sent to the members of the monitoring committee within one week of each board

meeting. The committee shall meet with the new board at least four times per year, and within one week after each meeting of the board and the committee, the committee shall file a Report to the Panel. The first meeting of the new board and the committee shall take place within 90 days of the appointment of the new board.

The committee's reports shall specifically advise the Panel of the progress or lack of progress towards achieving desegregation. Each member shall have access to the Court at all times, provided such person communicate to the Court in writing, file a copy of any such communication in the record of these proceedings, and send a copy of any such communication to the other committee members.

At least in the early stages of implementation, the monitoring committee shall be available to review and respond to decisions of the new board on an as-needed basis.

31. The monitoring committee shall give the new board a period of five years to achieve substantial progress toward eliminating the racial identifiability of Louisiana's universities. If at the end of five years substantial progress is not shown, the committee shall recommend to the Court more direct solutions, including Court appointment of board members or direct control by the committee of the system of higher education and merger of institutions. However, nothing stated herein shall be construed as a divestiture of this Court's continuing jurisdiction to take appropriate action to enforce this Order.

Interim Procedures

32. As previously indicated, the board shall be appointed and confirmed within 30 days of the entry of this Order. As each board member is appointed, the Panel shall be advised of such appointment by letter and shall be provided with a copy of such person's curriculum vitae.

If after 20 days from the entry of this Order the Governor foresees that all board members will not be appointed and confirmed within 30 days, the Governor shall submit to the Court a proposed timetable for completing the board selection process under the guidance of the monitoring committee. If the committee deems it necessary, it may recommend to the Court names of members to serve on the board. The Court reserves the right to make any appointments necessary to complete the composition of the board in a timely fashion or to veto the appointment of any board member.

33. The board shall assume responsibility for managing the state university system and implementing this remedial Order as soon as it is formed. While its first responsibility is to search for and appoint a system president, the board should immediately appoint an interim president. The interim president shall serve until the president is selected, in order to insure that centralization of control occurs forthwith and that the steps to be taken during the first year of the Order are not delayed. The board should have the full authority of the state, through the Governor and other state officials, to carry out its mandate. Any questions that arise during the interim period regarding implementation of this plan may be directed to the monitoring committee and by the committee to the Court, if necessary.

New Orleans, Louisiana, this 19th day of July, 1989.

/s/ John Minor Wisdom
JUDGE JOHN M. WISDOM

/s/ Charles Schwartz, Jr.
JUDGE CHARLES SCHWARTZ, JR.

/s/ Veronica D. Wicker
JUDGE VERONICA D. WICKER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

vs.

STATE OF LOUISIANA

ORDER AND REASONS

[Filed August 4, 1989]

Before JOHN M. WISDOM, Circuit Judge, CHARLES SCHWARTZ, JR., District Judge and VERONICA D. WICKER, District Judge

This matter is before the Court on motion of the Southern University Board of Supervisors for an order staying the execution of judgment pending the disposition of Southern's motion for new trial and/or to alter or amend judgment and pending appeal to the United States Supreme Court. The State Attorney General joined in Southern's motion, but the State acting through the Governor opposes it. The Panel is of the opinion no oral argument on the motion is necessary and the motion is hereby taken under submission without oral argument.

The Court has reviewed Southern's memorandum and the accompanying affidavits of Joe Terrell, Chairman of the Southern University Board of Supervisors; B.K. Agnihotri, Chancellor of Southern University Law Center; Rudy Gorrell, a third year student at the Southern University Law Center; George Williams, President of

Southern University and A&M College Faculty Senate; and A. Maurice Haynes, a graduate of the Southern University Law Center. These affidavits raise no new matters not previously considered by the Panel prior to the issuance of its Opinion and Order of July 19, 1989, and the Court is prepared to rule and does hereby rule as follows:

This case has been pending before this Panel for over 15 years. Following the utter failure of the consent decree, the Court undertook to tailor a remedy that would undo the segregation existing at all levels of the State's higher education system. Through the Court's inherent powers to take action to supervise the execution and enforcement of its orders the Court may make appropriate adjustments to its Order on an ad hoc basis. The Court will continue to oversee this case, principally by the mechanism of a monitoring system. In this regard, periodic reports of the Monitoring Committee will be filed in the record and will be available to the parties for their own evaluation.

Only one bell in the Court's Opinion and Order would be difficult to unring in the near future, and that is the actual assumption of power by the single administrative board and the accompanying dismantling of the four governing boards. We observe, however, that the segregation maintained by the four board system is incompatible with any suggestion that the four board system retains viability. For this and other reasons, the Panel is of the opinion that Southern has shown little likelihood it will prevail on the merits of this aspect of Southern's appeal, and thus, no stay is warranted on this ground. The Panel entertains similar doubts with respect to Southern's likelihood of success on the merits of its other claims.

Brown was decided thirty-five years ago. It is high time that higher education in Louisiana be reworked at all levels in a unified effort to improve the education offered in this state to all Louisiana citizens. This Court

will not countenance any delay in the effectuation of the tailored remedies it perceives to be mandated by the federal Constitution and the State's best interests.

The motion for a stay is accordingly DENIED.

New Orleans, Louisiana, August 4th, 1989.

/s/ John Minor Wisdom
JOHN MINOR WISDOM

/s/ Charles Schwartz, Jr.
CHARLES SCHWARTZ, JR.

/s/ Veronica D. Wicker
VERONICA D. WICKER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A'

UNITED STATES OF AMERICA

vs.

STATE OF LOUISIANA

REASONS FOR RULING

[Filed August 4, 1989]

Before JOHN MINOR WISDOM, Circuit Judge, and CHARLES SCHWARTZ, JR., and VERONICA D. WICKER, District Judges

This matter is before the Court on motions[1] of the United States of America, the Southern University Board of Supervisors joined by the State Attorney General, and Grambling University Alumni Association to alter or amend judgment or for new trial.[2] The State, acting through the Governor, opposes the motions in most respects. The motions were taken under submission with-

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[1] All motions were timely filed. *See* F.R.C.P. rules 6(a) and 59(b) & (e).

[2] The State Attorney General, Grambling and Southern have requested a stay of the Panel's Order of July 19, 1989, pending a determination of the merits of the motions for new trial and anticipated appeals by Southern and the State Attorney General. The State, acting through the Governor, opposes the stay. Grambling's motion for a stay was denied by Minute Entry of August 1. The motion for a stay filed by Southern and the State Attorney General was denied by Order and Reasons entered August 4, 1989.

out oral argument. For the following reasons, the motions are now GRANTED IN PART and DENIED IN PART.[3]

1. *Standing*

A threshold question arises as to whether the Grambling Alumni Association, an amicus curiae, and the Southern University Board of Supervisors, a state agency, have standing to request relief from the Court's July 19, 1989 Opinion and Order. The Court also notes that the State Attorney General has at least in part joined Southern's request for relief.[4]

The Court finds it unnecessary to address any standing issues at this juncture. However, the Court would observe that, as an amicus, Grambling lacks standing to prosecute independently any rehearing or appeal. Thus, the Panel has discretion to consider arguments raised by Grambling in conjunction with any other party's request for rehearing, but the Court is not bound to afford relief to an amicus apart from relief appropriate for those who are actual parties. Accordingly, the Panel has reviewed the matters raised by Grambling in conjunction with those raised by the United States, Southern, the Attorney General and the State through the Governor.

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[3] Simultaneously with the issuance of these Reasons for Ruling, the Court has entered a Supplemental Order specifying the particular relief granted as a result of the motions for rehearing and/or new trial.

[4] The State Attorney General expressly joins Southern's motion "insofar as such motion and memorandum object to the Court's finding of unconstitutionality of the Constitution and Laws of the State of Louisiana." This is puzzling, because the Panel does not read Southern's motion as challenging the Court's conclusion that the Louisiana system of higher education violates the federal Constitution. Rather, Southern challenges the scope of remedial relief ordered by the Court. We can only suppose that to the extent Southern supports the status quo, the State Attorney General joins Southern. However, Southern does not so limit its arguments.

2. *The Merits*

Rule 59 of the Federal Rules of Civil Procedure permits the granting of a new trial "for any of the reasons for which rehearings have heretofore been granted in suits in equity in courts of the United States." Moreover, although the rule speaks expressly to "trials" and "judgments," "[t]he concept of a new trial under Rule 59 is broad enough to include a rehearing of any matter decided by a court without a jury." *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2804, at 35. The general grounds for a new trial or rehearing are broad and include contentions that the decision in question is against the weight of the evidence, that the trial was unfair or that the Court committed a prejudicial error of law. *See id.* § 2805, at 37-38. Against this background, the Court will address what it perceives as the salient points raised by the memoranda.

A. *Desegregation of Faculty and Staff* [5]

Desegregation must be fostered at all levels of the State's higher education system, not just at the Board level and the student body level. It was never the Panel's intent to exclude faculty and staff from desegregation of the university system. Accordingly, the Court's Order of July 19, 1989 is hereby amended to require that the State desegregate the staffs and faculties of all public institutions, as detailed in the Supplemental Order issued simultaneously with these Reasons for Ruling.

B. *Termination of Powers of the Four Governing Boards* [6]

The Court further deems it appropriate to clarify the actual termination of the four boards' powers, as re-

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[5] Both Southern and the United States seek clarification of the Panel's Order in this respect.

[6] The issues here discussed were raised by the United States.

quested by the United States. Again, this matter is specifically addressed in the Court's Supplemental Order, which provides in essence for the four governing boards to cease operation upon appointment and confirmation of the single Board or, if appointment and confirmation are not timely achieved, upon the Court's appointment of the Board with the assistance of the Monitoring Committee.

C. *Reports of the Monitoring Committee*

By ordering that the Monitoring Committee shall file its reports,[7] the Panel intended those reports to be maintained in the public record of these proceedings. Accordingly, the Court will specifically supplement its Order by requiring the Clerk of Court to mail copies of the reports to all trial attorneys of record.

D. *The Applicable Legal Standards for Liability and Remedial Relief*

Southern contends that a new trial should be granted because the Court committed an error of law by fashioning its remedy on constitutional grounds rather than on Title VI grounds. For reasons set forth in this Court's opinion of August 2, 1988,[8] the Court rejects this contention. We there held that "whatever relief is available to a private plaintiff in a school desegregation suit under the Fourteenth Amendment is available to the United States under Title VI."

Southern also contends that the Court erred in failing to give sufficient weight to the Department of Health and Welfare (HEW) criteria for Title VI desegregation. Southern argues that the criteria articulated by HEW for evaluating desegregation plans should be binding on

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[7] At least four reports shall be filed per year.

[8] *See United States v. Louisiana*, 692 F. Supp. 642, 649-50 & nn. 21-23 (E.D. La. 1988).

this Court in fashioning a desegregation remedy. That argument is erroneous.

The HEW criteria were issued as guidelines for securing *voluntary* compliance. The voluntary compliance period has passed by the time a Title VI complaint is lodged in federal court. As David S. Tatel, then director of HEW's Office for Civil Rights, wrote in the introduction to the Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegragate State Systems of Public Higher Education, 43 Fed. Reg. 6658 (February 15, 1978):

> Where HEW has found that a state has not eliminated the remaining vestiges of segregation in its formerly dual system of public higher education, and is, therefore, in violation of Title VI of the Civil Rights Act of 1964, it is required first to attempt to secure compliance by voluntary means. When those efforts fail, HEW is required to seek enforcement either administratively or through the courts [citations omitted]. *These revised criteria are issued to assist such states in the preparation of desegregation plans as part of the process of securing voluntary compliance.*

Id. (emphasis added). Thus, as stated in HEW's own introduction to its criteria, those criteria are intended to apply only during the voluntary compliance period. That period ends prior to the commencement of litigation. Therefore, the HEW criteria are not intended to be applied by courts adjudicating Title VI violations.

Southern also contends that application of constitutional standards is more burdensome than application of the HEW criteria. That contention is false. HEW criteria must themselves pass constitutional muster by meeting or exceeding the constitutional standards of the Fourteenth Amendment. The HEW criteria were issued pursuant to Title VI, which Congress enacted to secure

the guarantees of the Fourteenth Amendment. It would therefore, be anomalous to suggest the HEW criteria could embody standards lower than those of the Fourteenth Amendment. As the Fifth Circuit Court of Appeals has observed, "There is no question but that Congress understood that Title VI's standard is that of the Constitution." *United States v. Marion City School Dist.*, 625 F.2d 607, 615 n. 20 (1980), *cert. denied*, 451 U.S. 910, 101 S. Ct. 1980, 68 L. Ed. 2d 298 (1981).[9]

E. *Quotas and Admissions Exceptions*

The United States objects to the Court's admissions exceptions, which generally require that each school institute admissions standards such that at least ten percent of the incoming students for the school be other-race students. The United States argues that this provision fails to satisfy the strict scrutiny test recently articulated in a non-school context in *City of Richmond v. J.A. Croson Co.*, —— U.S. ——, 109 S. Ct. 706, 720-23, 102 L. Ed. 2d 854 (1989) (plurality); 109 S. Ct. at 735 (Scalia, J., concurring). In an attempt to suggest that this provision is unconstitutional or, at least, not remedial, it characterizes the provision as establishing a rigid, inflexible, unnecessary quota system. The United States misconstrues the provision.

In adopting the Special Master's recommendation on this provision, the Court was mindful of the hesitancy federal courts properly have in establishing race-conscious remedies. As Justice O'Connor recently wrote: "Classifications based on race carry a danger of stigmatic harm." *Id.* at ——, 109 S. Ct. at 721. Nonetheless, at

[9] Because Southern does not specify what departures from the HEW criteria it contends this Court made, we cannot here address whether in fact there were such departures. In any event, the question of departures from HEW criteria is irrelevant to these proceedings because those criteria are inapplicable to Title VI adjudication for the reasons described above.

times, such remedies are required to best remedy or simply *to* "remedy prior racially discriminatory actions by the State that violate the Fourteenth Amendment." *United States v. Paradise*, 480 U.S. 149, ——, 107 S. Ct. 1053, 1076, 94 L. Ed. 2d 203 (1987) (Stevens, J., concurring). With this understanding, the Court addresses the objections to the provision.

First, unlike the City of Richmond, which had not made legitimate, articulated findings of prior discrimination against "Blacks, Spanish-speaking [citizens], Orientals, Indians, Eskimos, and Aleuts" in the city's construction industry, *see Croson*, —— U.S. ——, 109 S. Ct. at 723-28, this Court has made a specific judicial finding of prior discrimination with lingering segregation in Louisiana's entire public higher education system. Indeed, such a finding was the very basis for summary judgment against the State.

Second, the admissions provision is not an overreaching remedy such as was found to be impermissible in *Milliken v. Bradley*, 418 U.S. 717, 94 S. Ct. 3112, 41 L. Ed. 2d 1069 (1974) (*Milliken I*). Instead, the provision directly addresses and relates to the constitutional violation itself. *See Milliken v. Bradley*, 433 U.S. 267, 282, 97 S. Ct. 2749, 2758, 53 L. Ed. 2d 745 (1977) (*Milliken II*). Unlike the original interdistrict remedy at issue in *Milliken I*, the admissions provision here does not attempt to impose remedial provisions that reach beyond the scope of the violation; the Court has not imposed remedial provisions on Louisiana's public primary or secondary schools or even on the two state institutions of higher learning against which the Court found no liability (viz., Bossier Parish Community College and St. Bernard Parish Community College).[10]

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[10] While the Court indicated, primarily as a matter of what appears sound educational and administrative policy, that these two schools "*should* be incorporated into this system" of a new, single, comprehensive community college system in Louisiana, *see* Opinion

Nor is the admissions provision inflexible as the United States perceives it to be. *Cf. Pasadena City Board of Educ. v. Spangler*, 427 U.S. 424, 434, 96 S. Ct. 2697, 2703-04, 49 L. Ed. 2d 599 (1976). It was not the Court's intent that the figure of ten percent be deemed immutable or unchangeable in the inevitable change of circumstances. *Cf. Martin v. Wilks*, —— U.S. ——, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989). The Court has not attempted to require that the schools have a particular racial balance; such would ignore the wealth of non-race related factors that may legitimately affect racial make-up at different schools and organizations. *Cf. Bazemore v. Friday*, 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24, 91 S. Ct. 1267, 1280, 28 L. Ed. 2d 554 (1971). Instead, the provision is merely a useful starting point in the process of shaping the remedy. *See id.* at 25, 91 S. Ct. at 1280.

The provision should not be read to imply an absence of general equitable waiver conditions in the event the provision proves unworkable. *Cf. Paradise*, 480 U.S. at ——, 107 S. Ct. at 1075 (Powell, J., concurring); *Croson*, 109 S. Ct. at 729. If the Supervisory Board after having addressed the issue with the Monitoring Committee finds, based on more than just an administrative dislike of the Court's remedial duties in general, that the provision is failing to achieve the intended purpose of fostering desegregation, then it should seek appropriate changes at that time. In retaining continuing jurisdiction over desegregation cases, courts do not act solely to find a party in contempt for not obeying their injunctive orders or to enforce judgments as in any civil case. To the contrary, the very concept of continuing jurisdiction recognizes the Court's ability, its duty, to

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and Order of July 19, 1989, at 37 (emphasis added), the Court did not impose any mandatory requirements on these two schools or on the State relative to these two schools.

modify remedial orders as and when appropriate. While the Court cautions that it is not suggesting that it will be receptive to resolving quotidian disputes—indeed, it is not the Court's function to do so, and to do so would denigrate the function of not only the Monitoring Committee, but also and more importantly the State Board—the Court's primary function should not be considered to have ceased upon its ordering the State to implement the remedial plan. *See United States v. Lawrence County School Dist.*, 799 F.2d 1031, 1043 (4th Cir. 1986), *reh'g den.* 808 F.2d 1063 (5th Cir. 1987) (en banc).

The United States suggests that alternative measures largely reminiscent of those in the consent decree would achieve the desired goal of desegregation with all deliberate speed as well as or better than the Court's provision. The Special Master considered and, at least implicitly, rejected the suggested alternatives as insufficient. This finding is not only not clearly erroneous, but is eminently correct as the utter failure of the consent decree confirmed.

Nor does the modest provision seek to remedy prior discrimination by means of "over-correction." *Cf. Paradise*, 480 U.S. at ——, 107 S. Ct. at 1081 (dissent) (criticizing the majority's acceptance of the State's 1-for-1 trooper promotion quota that "far exceeded the percentage of blacks in the trooper force"). The initial ten percent figure is simply not disproportionate relative to the overall racial balance within the entire higher education system. Despite the United States' fear, the provision should not have the effect of punishing the innocent, for the provision does not tend to exclude an otherwise potential student from attending a Louisiana public college; the provision does not shut off Louisiana's public higher education system to anyone. Instead, the provision must be viewed in its proper context, namely, as complementary to selective admissions provisions; the general purpose of selective admissions provisions is to

avoid "white flight" and lingering segregation that has occurred where there were duplicative programs, while the exceptions provision ameliorates any detrimental side effects that selective admissions might have on minority students.

Meanwhile, Southern appears to take an opposite position on the Court's rejection of the Special Master's recommendation that the new supervisory Board be initially over-represented by black members relative to either the general State population, the State academic or student population, or the available qualified persons for Board membership.[11] Again, and sensing that Southern is perhaps less concerned with desegregation than with maintaining its power as a political institution of the State, the Court disagrees.

The Court stresses that federal court cannot be, and is not and must not be, faced with a Hobson's choice whenever it adopts a remedial plan that must, by necessity, address a broad concern. *See Swann*, 402 U.S. at 28, 91 S. Ct. at 1282. Just because a limited, flexible race-conscious provision may be appropriate to remedy one particular problem does not mean that such a provision must or should be imposed to address different problems; in other words, what is narrowly tailored for one particular problem may not be for another.

Southern suggests that the Court acted impermissibly in rejecting the Special Master's recommendation because the Court did not find the Special Master's find-

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[11] On August 2, 1989, the Governor appointed the 17 members to the new Board, of which six are black persons and six are women. For a list of the members' names along with a brief resume of each, see The (New Orleans) Times-Picayune, Aug. 3, 1989, at A-8, a copy of which is attached hereto as Appendix A. Although the Governor's choice remains subject to confirmation by the Louisiana Senate, the Governor appears to have laid to rest Southern's expressed fear that he would disregard black membership on the new Board.

ing of fact on this point to be clearly erroneous. Southern misperceives the basis of the Court's ruling. The Court did not disagree with the Special Master's findings of fact. Instead, the Court disagreed with the legal conclusion to be drawn from his findings; these conclusions of law, the Court repeats, are subject to *de novo* review.

A requirement of interim over-representation on the new Board would fail any "narrowly tailored" test. With the new board, there can logically be no finding of prior discrimination by the Board; thus, it is difficult to conceive how such a provision should be construed as a remedy and as not an impermissible requirement that a particular racial mix be maintained.[12]

The Court comments briefly on certain material distinctions between its adopting the admissions exceptions and its rejecting the Board over-representation: The former accommodates federal-state comity, whereas the latter cannot. The primary obligation to supervise and evaluate the success of or the need for change in the admissions provision lies with the board, which is a State entity chosen by persons elected by the citizens of the State; this provsion avoids needless intervention and interference by federal courts. Necessarily, however, this Court and the Monitoring Committee would have to exercise active, interventionary supervision of the Board if an over-representation quota system were established,

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[12] The Court separately notes that both the Special Master and Southern erroneously presumed that in determining whether blacks were adequately represented on the new Board, one should compare the ratio of black board members to the Board as a whole (which has turned out likely to be 35%, *see supra* note 11) with the ratio of black citizens to the entire population (or perhaps with the ratio of black students to all students attending Louisiana's State universities and colleges). The presumption is misplaced. *See Wards Cove Packing Co. v. Atonio*, —— U.S. ——, 109 S. Ct. 2115, 2121-22, 104 L. Ed. 2d 733 (1989); *Croson*, 109 S. Ct. at 724-25.

even temporarily, lest such system transform into an impermissible goal of fixed racial percentages of the Board (since the board is *the* State entity to supervise the State's higher education system, the Court and Monitoring Committee are by default the ones to supervise the Board). Thus, whereas a race-conscious remedy concerning student admissions is able to accommodate federalism concerns that permeate our constitutional system of dual sovereignty between the federal government and the states, a quota system for the Board cannot.

F. *The Merger of LSU Law Center and Southern University Law School* [13]

The separation of white students from black students in a manner disproportionately detrimental to the education of black students is clearly demonstrated by the coexistence of Southern University Law School, where virtually all the State's black law students go, and LSU Law Center, which had a 3.8% black student population (30 students) for the 1988 school year. Although this case has been pending since 1974, public legal education in Louisiana remains separate and unequal.

As stated in the Court's Opinion and Order of July 19, 1989, we accept the factual findings of the Special Master with regard to merger generally, and we have specifically reserved merger at this juncture for most of the State's geographically proximate "black" and "white" universities. Thus, Southern's invocation of the clearly erroneous rule is inapposite. The Panel departs from the Special Master's recommendation, however, in the Panel's application of the Master's findings of the legal question of remedy. We believe it would be legal error to evaluate desegregation from the standpoint of a single school (LSU Law Center), rather than to evaluate the overall practical segregation of legal education per-

[13] Both the United States and Southern request reconsideration of this aspect of the Court's Ruling.

petuated by maintaining the two law schools side by side. If painting with a broad brush were appropriate in remedying constitutional violations, which it is not, consideration of all state universities globally would have been permissible. But even as the Court concludes it is impermissible to achieve desegregation by merger of all of the State's proximate black and white institutions, the Court also concludes the problem of desegregating legal education merits particularized consideration and relief.

In making this particularized inquiry, the Panel shares the movants' concerns for providing access for minority students to quality legal education and for ensuring that any remedial action is carefully drawn so as not to disproportionately affect black students. However, the reality of legal educaation in Louisiana, as detailed by the Special Master's factual findings, is that black law students do not have the benefit of higher quality legal education. The Consent Decree experience worked no improvement in this area, and there is in the Court's view no reason to suspect that the unconstitutional segregation perpetuated by the two schools will resolve itself over time. The State's record for offering quality legal education to black students remains woefully inadequate.

Moreover, as detailed in the Court's Opinion and Order, merger of the law schools does not present the same problematic issues militating against merger as were discussed by the Special Master in the context of other universities.[14] There is no reason that all students should not have the benefit of the State's limited resources for legal education. It was with such concerns in mind as sharing resources (including the faculty's expertise, library and research facilities, job placement programs, etc.) and offering equal access to those re-

[14] See Final Report, pp. 36-37.

sources that the Court ordered the present merger. It is with such concerns in mind that the Panel left open administrative matters such as new admissions standards for the newly merged law school and the number of students to be admitted.

The movants also assert that merger will result in limiting access to legal education to the disproportionate detriment of black students. The Court disagrees. Statistics for the two law schools show that as of 1987, enrollment at LSU numbered 702 students, with 20 minority students or a minority enrollment of 2.8%,[15] and enrollment at Southern totalled 343 students, with a minority enrollment of 199 or 58%, for a total enrollment of 1085, with 219 minority students or 20% minority enrollment.[16] For the sake of comparison, the Court takes judicial notice that Tulane University Law School, a private institution located in New Orleans with highly selective admissions standards, had a 1988-89 school year enrollment of 855 students, of which 18% were minority students.[17] Thus, even if the Board did no more than combine the two schools, the LSU system could still offer an opportunity for education of minorities in Louisiana comparable to that offered in the past year by Tulane University, one of the South's finest law schools. Surely the necessity for offering additional improved quality legal educational opportunities outweighs Southern's in-

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[15] By 1988, LSU Law Center had 3.8% black students. See Final Report, p. 13, Chart 1.

[16] These figures are taken from the figures for Law Schools on the 1987 Approved List of the American Bar Association. The Special Master did not make a particularized fact finding as to the number of students enrolled only at the Southern Law School for 1988; thus the Panel is unable to rely solely on the statistics set forth in Chart 1, p. 13 of the Special Master's Report.

[17] See Tulane Admissions Minority Fact Sheet, attached hereto as Appendix B.

stitutional loyalty in this instance.[18] And while concern for the traditions and substantial alumni following of many of the schools and for the administrative complexities inherent in merger caused the Court to reject merger as an across the board remedy, the problem of legal education presents special concerns.[19]

A "court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann*, 402 U.S. at 15, 91 S. Ct. at 1276. This flexibility regarding remedies is especially called for in the context of legal education. Almost forty years ago in *Sweatt v. Painter*, 339 U.S. 629, 634, 70 S. Ct. 848, 850 (1950), the Supreme Court recognized that a state's predominantly white law school might possess "to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school." These qualities include the reputation of the faculty, the position and influence of alumni, and even the prestige of the school.

Where the extent of the constitutional deprivation is great and other milder remedies have failed, courts have found the merger of educational institutions to be ap-

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[18] Another revealing statistical item is the relative size of the law libraries of LSU and Southern: As of fall 1987 LSU had 438,225 total book volumes and microfilm/microfiche equivalents, whereas Southern had 186,336. *See* D. Thomas, "1986-87 Statistical Survey of Law School Libraries and Librarians," 80 Law Library Journal 485, 487-88, 496 & 499 (1988). As of fall 1987, LSU ranked 19th in library volumes, whereas Southern ranked 94th in the country out of 175 schools. Given the paramount importance of legal research to the training of lawyers and the practice of law, leaving in place a system that so effectively limits minority student learning resources would ratify vestiges of past discrimination.

[19] Lest there be any doubt, it is precisely because the Court perceives closure and/or merger of universities as a viable remedy that the Court in its Opinion and Order expressly reserved the right to implement further closure in the future.

propriate. *Lee v. Demopolis City School Sys.*, 557 F.2d 1053, *reh'g denied*, 561 F.2d 831 (5th Cir. 1977), *cert. denied sub nom., Demopolis City School Dist. v. United States*, 434 U.S. 1014, 98 S. Ct. 729, 54 L. Ed. 2d 758 (1978) is such a case. Elementary schools located just over two miles apart remained one-race schools. Finding that milder measures had failed, the Court ordered the pairing of the schools. The merger of institutions of higher education was ordered in *Geier v. Univ. of Tenn.*, 597 F.2d 1056, 1069 (6th Cir.), *cert. denied*, 444 U.S. 886, 100 S. Ct. 180, 62 L. Ed. 2d 117 (1979), where the Court found that the merger order fell within its equitable powers and that the remedy would not pose significant administrative difficulty for the Court.

G. *Enhancement Money*

Our order does not say how much must be spent in implementing the plan. We refuse to name our price now, Our lack of specificity does not create an opening for those who would let meritorious programs wither for lack of sustenance. Instead, it emphasizes again that the State must implement the plan ordered by this Court, regardless of cost: the money must come to the remedy; the remedy will not bend to the money. Of course, we recognize that the Board charged with achieving equality of education must be financially responsible, and that part of its responsibility is attention to the fiscal problems of the State. That is part of the Board's task. It may find, for example, that quick elimination of duplicate programs may free funds for other programs. When necessary, the Board may obtain appropriate budgetary information from state agencies. Finally, this Court will watch carefully to safeguard both the letter and spirit of its Order.

H. *Reverse Incentives*

Our Order allows the Board to "consider" removing financial scholarships and other penalties from institu-

tions that do not recruit and retain other-race students and faculty. There is little risk that this will become a way of punishing primarily black institutions. First, the Board will measure the institution's progress by annual goals that are "realistic" for the institution. For primarily black institutions, that goal will be partly based on those institutions' traditional special role in serving black students. Second, at least initially, the Board's involvement is more likely to be prospective rather than primitive and retroactive. The Board may designate for primarily black institutions new program offerings that will attract other-race students. It is important to note that the Order does not require reverse incentives. Finally, abuse of reverse incentives to punish primarily black institutions is contrary to the intent of the Order. This Court which will oversee implementation of the Order will not allow such abuse of its Order.

I. *Dr. Murrill's Appointment*

We further reject Southern's contention that Dr. Paul W. Murrill's former status as chancellor of Louisiana State University A&M renders his appointment inappropriate. Dr. Murrill is presently Special Advisor of Gulf States Utilities Company of Beaumont, Texas, a post he has held since June 1987. From March 1982 to June 1984, he served as Chairman of the Board and Chief Executive Officer of Gulf States. Dr. Murrill is thus removed in time and vocation from his former position as Chancellor of Louisiana State University A&M and his presence on the Monitoring Committee presents neither a conflict of interest nor the appearance of a conflict. The Court has endeavored to appoint a qualified Monitoring Committee with geographical and racial diversity. As a Louisiana resident and educator, Dr. Murrill will bring a necessary dimension of experience and insight to the Monitoring Committee. Moreover, members of the Monitoring Committee have not been given unfettered discre-

tion to make judgments concerning Louisiana's progress toward a further desegregated environment. The Court remains as the final arbiter of the results achieved under the new governance structure.

Conclusion

Southern complains generally that much of the remedial relief ordered is not tailored to the violations found and that the order invades areas of decision-making reserved to the State. In other areas, such as enhancement funding and imposition of quotas, Southern asserts the Court has not gone far enough. Curiously, the State Attorney General has joined Southern, even though the tenor of Southern's motion suggests no quarrel with the Court's finding of constitutional violations where this conclusion could be used by Southern to seek increased funding or other benefits for predominantly black schools. Moreover, the United States argued vigorously in its objections to the Special Master's Final Report that the remedies adopted in large part by the Panel did not go far enough. The Court's plan is a considered effort to reconcile innumerable interests and provide for specification of enforceable guidelines for ending desegregation while at the same time permitting flexibility in the day to day management of a university system. The Court cannot run Louisiana's system of higher education and enough flexibility must be provided for the administrative structure operate as it deems best, but within the parameters outlined by the Court. With the cooperation of the parties and the assistance of the Monitoring Committee, an ongoing effort can be made to adjust the Court's basic remedial plan to the State's continuing needs.

The State of Louisiana must have an adequate number of sufficiently educated workers to fulfill the needs of industry. Management tends to avoid areas where it perceives there is a shortcoming of public higher educa-

tion. Black students under our present segregated system disproportionately and unconstitutionally bear the impact of such shortcoming.

These same black students will be disproportionately penalized in the work force, when their education has not helped prepare them for the competition they will encounter there. The evidence also overwhelmingly shows that segregation perpetuated by duplication of programs has wasted valuable and limited educational resources. The Court has taken great pains to fashion a starting place for the termination of segregation. This remedy envisions an on-going effort, with necessary adaptations as the educational system in Louisiana changes and hopefully rises to meet the challenge before it.

For all the above reasons, the Court declines to alter its remedial Plan, except in certain particulars outlined above and detailed in the Court's Supplemental Order issued this date. The motions are therefore DENIED IN PART and GRANTED IN PART.

New Orleans, Louisiana, August 4, 1989.

/s/ John Minor Wisdom
JOHN MINOR WISDOM

/s/ Charles Schwartz, Jr.
CHARLES SCHWATRZ, JR.

/s/ Veronica D. Wicker
VERONICA D. WICKER

APPENDIX A

A-8 Thursday, August 3, 1989 THE TIMES-PICAYUNE 3

CONTINUED . . .

Higher education board
Gov. Roemer's 17 appointees to the new board to govern all of higher education

Mack Abraham. Grocer, 64, from Lake Charles. Currently a member of the Southern University Board of Supervisors and a former member of the Board of Trustees for Colleges and Universities.

E. Edwards Barham. Farmer, 52, from Oak Ridge. A state senator from 1976-80 and former member of the state Board of Regents for Higher Education.

Dr. Joan Blondin. Physician, 52, from Monroe. Member of the Board of Regents.

David Conroy. Lawyer, 59, from New Orleans. A close friend of Gov. Roemer who served with him as a delegate to the constitutional convention of 1973. He is a member of the executive committee of the LSU Board of Supervisors.

Janice Martin Foster. Lawyer, 43, from New Orleans. Former member of the Sewerage & Water Board.

Elton C. Harrison III. Educator, from New Orleans. Vice president for academic affairs and vice president for administration and planning at Dillard University. Currently a member of the Southern University Board of Supervisors.

The Rev. John Keller. Jesuit priest, 72, from New Orleans. Physicist and lawyer, he is chairman of the Board of Regents.

Rolph McCollister Jr. Publisher, 34, from Baton Rouge. Publishes the Baton Rouge Business Report. A key

campaign contributor and campaign worker for Roemer. Currently a member of the LSU Board of Supervisors.

Ernest Nabers Jr. Educator and city official, 59, from Lafayette. Former coach and high school principal, he runs Lafayette's recreation and parks system. Former member of the Southern University Board of Supervisors.

Gloria Patron. Educator, 59, from Slidell. Taught Spanish at the University of New Orleans and Orleans public schools. Serves on the Board of Trustees for State Colleges and Universities.

Thomas P. Perkins Jr. Lawyer, 35, from Baton Rouge. Adjunct professor at the LSU Law Center. Currently a member of the state Board of Regents.

Allene K. Rayford. Musician, from Baton Rouge. Master's degree from the University of Michigan and former faculty member at Talladega College. Former university organist at Southern University.

Virginia Kilpatrick Shehee. Insurance executive, 66, from Shreveport. Former state senator, serves on the board of trustees of Centenary College.

Joe D. Smith Jr. Newspaper executive, 67, from Alexandria. Former member of the Board of Regents and was chairman of Roemer's task force on higher education desegregation.

Jesse Stone. Educator, 65, from Baton Rouge. Former President of the Southern University system until 1985, now on the Southern law school faculty.

Joseph L. Waitz. Lawyer, 56, from Houma. Member of the LSU Board of Regents.

Barbara Turner Windhorst. Educator, 48, from New Orleans. Assistant superintendent for personnel in Jefferson Parish schools. Member of the Board of Trustees for State Colleges and Universities and wife of Sen. Fritz Windhorst.

APPENDIX B

MINORITY FACT SHEET

TULANE

Admissions
Tulane Law School
Joseph Merrick Jones Hall
Tulane University
New Orleans, Louisiana 70118-5670
(504) 865-5930

1988-1989 MINORITY J.D. ENROLLMENT

152/855=18% of the school's total J. D. enrollment

Black	86	Asian	15	Other	2
Hispanic	44	Native American	5		

Out-of-State 66% States represented by minority students: 24 (plus D.C. and Puerto Rico)

Colleges represented by minority students: 83, including:

Harvard	Northwestern
Princeton	Notre Dame
U of Pennsylvania	Vassar
Georgetown	Emory
Haverford	Morehouse
Jackson State	Spelman
Stanford	U of Virginia
Dartmouth	U of Texas
UCLA	SMU
Howard	Tufts
Bryn Mawr	Boston College
Colgate	Marquette

(15 traditionally black colleges are represented.)

SPECIAL ACTIVITIES

PALS-New Orleans

Mentor program in which students are individually matched with practicing attorneys committed to providing career counseling, job-networking, and academic support.

Minority Job Fairs

Developed by Tulane's Office of Career Services and sponsored annually by the Louisiana State Bar Association; 35 prominent law firms interview 1st, 2nd, and 3rd year students for summer clerk and permanent associate positions. Tulane co-sponsors the Southeastern Minority Job Fair in Atlanta.

National Black Law Journal

Tulane is the first law school in the South to be selected to publish an issue of the *National Black Law Journal*. Tulane will publish the Spring 1989 issue, focusing on race relations in the South.

Academic Support

The School has offered an optional course to minority and non-minority first-year students whose LSAT scores and undergraduate GPAs may indicate a need for additional academic support. The course, Legal Analysis, provides intensive practice in writing, analysis, and exam-taking skills, as well as individualized weekly feedback from a faculty member and a Senior Fellow. Tutoring services are also available.

Financial Aid

The School awards scholarship aid to students on the basis of a combination of need and merit. A substantial amount of the School's total scholarship aid goes to minority students. In addition, various loan programs are available to law students. The School has its own Coordinator for Financial Aid who spends a good deal of time explaining the ins and

outs of the financial aid process and counseling students about financial aid.

Student Organizations

Tulane has active and involved chapters of the Black Law Student Association (BLSA) and La Alianza del Derecho, as well as 18 other student organizations emphasizing specific areas such as environmental law, public interest law, sports and entertainment law, or women and the law. The Asian Law Student Organization was founded in 1987.

Other Support and Services

Among the responsibilities of the Assistant Dean of Students is providing academic and personal counseling and placement assistance directed toward minority students. In addition, the School has a full-service, active Office of Career Services, and a number of individuals in administrative roles who are available for counseling. Panel discussions on career opportunities are held periodically, as are more informal opportunities to meet with practicing attorneys.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action
No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA

SUPPLEMENTAL ORDER

[Filed August 4, 1989]

Before JOHN MINOR WISDOM, Circuit Judge, and CHARLES SCHWARTZ, JR., and VERONICA D. WICKER, District Judges

This matter is before the Court on motions of the United States of America, the Southern University Board of Supervisors joined by the Attorney General and the Grambling Alumni Association for new trial and/or to alter or amend judgment. These motions are hereby GRANTED in part and DENIED in part, and in order to obviate any ambiguity or uncertainty contained in the Panel's Opinion and Order of July 19, 1989, the Court specifically adopts the following suggestions of the parties. These matters are for the most part implicit in and consistent with the Opinion and Order and may also be brought before the Court by the Monitoring Committee.

Accordingly, it is ORDERED:

(1) The Board shall immediately desegregate the staffs and faculties of all public institutions by implementing at each state institution aggressive recruitment

of qualified other-race employees and nondiscriminatory assignment policies, as set forth below [1]:

(A) The Board shall require each institution to take affirmative steps to recruit and hire qualified other-race faculty, staff, and administrators. The Board shall be committed to making outreach efforts where the proportion of black administrators, faculty, and staff employed at each predominantly white public institution of higher education and staff employed by each higher education board is different from the proportion of black individuals with the required credentials in the relevant labor market area. The predominantly black institutions shall also continue outreach efforts to increase their proportion of other-race staff and administrators. Each institution shall within 90 days develop a plan for recruiting qualified other-race faculty, administrators, and staff, taking into account the relevant labor market data for each category of positions and documenting the data used as part of the aforementioned plan; shall provide said plan to the Board and the Monitoring Committee.

(B) Institutions' affirmative efforts shall include advertising in professional journals, such as the "Chronicle of Higher Education," and local newspapers, and initiating contact with universities nationwide concerning vacancy announcements.

(C) All state institutions shall take all reasonable nondiscriminatory steps to increase the number of qualified other-race persons among its part-time and full-time faculties, professional administrators, and support staff positions through employing, training, and promoting qualified other-race persons as vacancies occur and new positions are created.

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[1] The matters set forth in item (1) generally reflect clarification requested by the United States of America and by the Southern Board of Supervisors. The specific matters set forth in subsections (A) through (D) were adopted from the United States' Proposed Plan, Rec. Doc. No. 325, pp. 23-25.

(D) Each state institution shall make a good faith effort, in addition to its existing recruitment activities, to identify qualified other-race persons living and/or working within a reasonable distance of the institution who are interested in teaching on a part-time basis at the institution. Each institution shall consider the following persons: professionals, school teachers and administrators, and persons employed by businesses within a reasonable distance of the institution, who are qualified to teach the courts or courses involved. In attempting to identify persons who may be interested and available for part-time employment with the institution, early institution shall seek the assistance of professional associations, community groups, businesses, and elementary and secondary school officials.

The utilization of part-time faculty shall be consistent with accreditation requirements and the needs of the institutions, and no qualified applicant shall be denied such a position on the basis of race.

(2) The four governing boards shall cease operation and their powers to be consolidated into a single board no later than thirty (30) days from the entry of the Court's Order of July 19, 1989, or if no single board is appointed and ratified by that time, immediately upon appointment of the single board by the Court in conjunction with the Monitoring Committee.[2]

(3) The reports of the Monitoring Committee shall be filed in the record and the Clerk of Court shall mail copies of the report to all trial attorneys of record. The parties shall review each of the Monitoring Committee reports and file with the Court and mail to each of the Committee members within 30 days after the Monitoring Committee Report is filed with the Clerk any comments about progress or lack of progress in achieving desegregation.

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[2] This clarification is made at the request of the United States.

If upon reviewing a particular report, any party has concerns which it expressed in writing, such party or parties may meet with the Monitoring Committee for the purpose of discussing its concerns and offering any suggestions it may have on how problems areas may be addressed. Should such concerns not be resolved amicably, such party or parties may petition the Court for the purpose of convening a status conference and scheduling a hearing, if necessary.[3]

(4) The Court's Injunction and Orders shall remain in effect until December 31, 1994, unless the plaintiff and/or another party by motion filed prior to that date request the Court to conduct a hearing for the purpose of determining whether the defendants have fully complied with the Court's Orders and/or whether or not the case should be dismissed and/or whether or not additional relief be granted. In such a hearing, the burden shall be upon movant to prove by a preponderance of the evidence that the objectives of the Order have not been achieved and further and/or continued and/or additional relief is required. If that burden is carried, this Court shall enter such further Orders as is appropriate. If that burden is not carried, jurisdiction shall be terminated and this action shall be closed and dismissed with prejudice.[4]

New Orleans, Louisiana, this 4th day of August, 1989.

/s/ John Minor Wisdom
JUDGE JOHN MINOR WISDOM

/s/ Charles Schwartz, Jr.
JUDGE CHARLES SCHWARTZ, JR.

/s/ Veronica D. Wicker
JUDGE VERONICA D. WICKER

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[3] The clarifications set forth in item (3) were requested by the United States.

[4] The matters set forth in item (4) are based upon the United States' Proposed Plan, Rec. Doc. No. 325, pp. 34-35.

APPENDIX B

28 U.S.C. § 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

28 U.S.C. § 2282. Injunction against enforcement of Federal statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

28 U.S.C. § 2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single

judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

(As amended June 11, 1960, Pub. L. 86-507, § 1(19), 74 Stat. 201; Aug. 12, 1976, Pub. L. 94-381, § 3, 90 Stat. 1119; Nov. 8, 1984, Pub. L. 98-620, Title IV, § 402 (29)(E), 98 Stat. 3359.)

PUBLIC LAW 94-381 [S. 537]; Aug. 12, 1976

DISTRICT COURTS—THREE-JUDGE COURT—REQUIREMENT

For Legislative History of Act, see p. 1988

An Act to improve judicial machinery by amending the requirement for a three-judge court in certain cases and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2281 of title 28, United States Code, is repealed.

SEC. 2. That section 2282 of title 28, United States Code, is repealed.

SEC. 3. That section 2284 of title 28, United States Code, is amended to read as follows:

"2284. Three-judge court; when required; composition; procedure

"(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

"(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

"(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to

whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

"(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State. The hearing shall be given precedence and held at the earliest practicable day.

"(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.".

SEC. 4. The analysis of chapter 155 of title 28, United States Code, is amended to read as follows:

"sec.

"2281. Repealed.

"2282. Repealed.

"2283. Stay of State court proceedings.

"2284. Three-judge district court; when required; composition; procedure.".

SEC. 5. (a) Section 2403 of title 28, United States Code is amended—

(1) by inserting the subsection "(a)" immediately before "In" and

(2) by adding at the end thereof the following new subsection:

"(b) In any action, suit, or proceeding, in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.".

(b) The catchline to section 2403 of title 28, United States Code, is amended to read as follows:

"§ 2403. Intervention by United States or a State; constitutional question".

SEC. 6. Item 2403 of the analysis of chapter 161, of title 28, United States Code, is amended to read as follows:

"2403. Intervention by United States or a State; constitutional question.".

SEC. 7. This Act shall not apply to any action commenced on or before the date of enactment.

Approved August 12, 1976.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 94-1379 accompanying H.R. 6150 (Comm. on the Judiciary).

SENATE REPORT No. 94-204 (Comm. on the Judiciary).

CONGRESSIONAL RECORD:

Vol. 121 (1975): June 20, considered and passed Senate.

Vol. 122 (1976): Aug. 2, considered and passed House, in lieu of H.R. 6150.

42 U.S.C. § 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Pub. L. 88-352, Title VI, § 601, July 2, 1964, 78 Stat. 252.

Louisiana Constitution of 1974

ARTICLE VIII. EDUCATION

Preamble

The goal of the public educational system is to provide learning environments and experiences, at all stages of human development, that are humane, just, and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop to his full potential.

§ 1. Public Educational System

Section 1. The legislature shall provide for the education of the people of the state and shall establish and maintain a public educational system.

§ 2. State Superintendent of Education

Section 2. There shall be a superintendent of education for public elementary and secondary education who, subject to provisions for appointment in lieu of election set forth in Article IV, Section 20, of this constitution, shall be elected for a term of four years. If the office is made appointive, the State Board of Elementary and Secondary Education shall make the appointment. He shall be the administrative head of the Department of Education and shall implement the policies of the State Board of Elementary and Secondary Education and the laws affecting schools under its jurisdiction. The qualifications and other powers, functions, duties, and responsibilities of the superintendent shall be provided by law.

§ 3. State Board of Elementary and Secondary Education

Section 3. (A) Creation; Functions. The State Board of Elementary and Secondary Education is created as a body corporate. It shall supervise and control the public

elementary and secondary schools, vocational-technical training and special schools under its jurisdiction and shall have budgetary responsibility for all funds appropriated or allocated by the state for those schools, all as provided by law. The board shall have other powers, duties, and responsibilities as provided by this constitution or by law, but shall have no control over the business affairs of a parish or city school board or the selection or removal of its officers and employees.

(B) Membership, terms. The board shall consist of eleven members, eight of whom shall be elected from single-member districts, which shall be determined as provided by law, and three of whom shall be appointed by the governor from the state at large, with consent of the Senate. Members shall serve terms of four years, which shall be concurrent with the term of the governor. Amended by Acts 1979, No. 800, § 1, approved Oct. 27, 1979, eff. Nov. 30, 1979.

(C) Vacancy. A vacancy in the office of an elected member, if the remaining portion of the term is more than one year, shall be filled for the remainder of the term by election, as provided by law. Other vacancies shall be filled for the remainder of the term by appointment by the governor.

§ 4. Approval of Private Schools

Section 4. Upon application by a private elementary, secondary, or proprietary school with a sustained curriculum or specialized course of study of quality at least equal to that prescribed for similar public schools, the State Board of Elementary and Secondary Education shall approve the private school. A certificate issued by an approved private school shall carry the same privileges as one issued by a state public school.

§ 5. Board of Regents

Section 5. (A) Creation; Functions. The Board of Regents is created as a body corporate. It shall plan,

coordinate, and have budgetary responsibility for all public higher education and shall have other powers, duties, and responsibilities provided in this Section or by law.

(B) Membership; Terms. The board shall consist of fifteen electors appointed by the governor, with consent of the Senate, for overlapping terms of six years, following initial terms which shall be fixed by law. At least one member, but no more than two members, shall be appointed from each congressional district.

(C) Vacancy. A vacancy occurring prior to the expiration of a term shall be filled for the remainder of the unexpired term by appointment by the governor, with consent of the Senate.

(D) Powers. The Board of Regents shall meet with the State Board of Elementary and Secondary Education at least twice a year to coordinate programs of public elementary, secondary, vocational-technical, career, and higher education. The Board of Regents shall have the following powers, duties, and responsibilities relating to public institutions of higher education:

(1) To revise or eliminate an existing degree program, department of instruction, division, or similar subdivision.

(2) To approve, disapprove, or modify a proposed degree program, department of instruction, division, or similar subdivision.

(3) To study the need for and feasibility of any new institution of post-secondary education, including branches of institutions and conversion of two-year institutions to institutions offering longer courses of study. If the creation of a new institution, the addition of another management board, or the transfer of an existing institution from one board to another is proposed, the Board of Regents shall report its written findings and recommendations to

the legislature within one year. Only after the report has been filed, or, after one year if no report is filed, may the legislature take affirmative action on such a proposal and then only by law enacted by two-thirds of the elected members of each house.

(4) To formulate and make timely revision of a master plan for higher education. As a minimum, the plan shall include a formula for equitable distribution of funds to the institutions of higher education.

(5) To require that every higher education board submit to it, at a time it specifies, an annual budget proposal for operational needs and for capital needs of each institution under the control of each board. The Board of Regents shall submit its budget recommendations for all institutions of higher education in the state. It shall recommend priorities for capital construction and improvements.

(E) Powers Not Vested. Powers of management over public institutions of higher education not specifically vested by this Section in the Board of Regents are reserved to the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical College, the Board of Trustees for State Colleges and Universities, and any other such board created pursuant to this Article, as to the institutions under the control of each.

§ 6. Board of Trustees for State Colleges and Universities

Section 6. (A) Creation; Functions. The Board of Trustees for State Colleges and Universities is created as a body corporate. Subject to powers vested by this Article in the Board of Regents, it shall have supervision and management of state colleges and universities not managed by a higher education board created by or under this Article.

(B) Membership; Terms. The board shall be composed of two members from each congressional district and one member from the state at large, appointed by the governor with consent of the Senate. The members shall serve overlapping terms of six years, following initial terms fixed by law.

(C) Vacancy. A vacancy occurrng prior to the expiration of a term shall be filled for the remainder of the unexpired term by appointment by the governor, with consent of the Senate.

§ 7. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College; Board of Supervisors of Southern University and Agricultural and Mechanical College

Section 7. (A) Creation; Powers. The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College and the Board of Supervisors of Southern University and Agricultural and Mechanical College are created as bodies corporate. Subject to powers vested by this Article in the Board of Regents, each shall supervise and manage the institutions, statewide agricultural programs, and other programs administered through its system.

(B) Membership; Terms. Each board shall be composed of two members from each congressional district and one member from the state at large, appointed by the governor with consent of the Senate. The members shall serve overlapping terms of six years, following initial terms fixed by law.

(C) Vacancy. A vacancy occurring prior to the expiration of a term shall be filled for the remainder of the unexpired term by appointment by the governor, with consent of the Senate.

§ 8. Boards; Membership; Compensation

Section 8. (A) Dual Membership. No person shall be eligible to serve simultaneously on more than one board created or pursuant to this Article.

(B) Student membership. The legislature may provide for the membership of one student on the boards created by Sections 5, 6 and 7 of this Article. The term of a student member shall not exceed one year, and no student member shall be eligible to succeed himself. A student member shall have all of the privileges and rights of other board members.

(C) Compensation. A member of a board created by or pursuant to this Article shall serve without pay, but per diem and expenses may be provided by law.

§ 9. Parish School Boards; Parish Superintendents

Section 9. (A) Boards. The legislature shall create parish school boards and provide for the election of their members.

(B) Superintendents. Each parish board shall elect a superintendent of parish schools. The State Board of Elementary and Secondary Education shall fix the qualifications and prescribe the duties of the parish superintendent. He need not be a resident of the parish in which he serves.

§ 10. Existing Boards and Systems Recognized; Consolidation

Section 10. (A) Recognition. Parish and city school board systems in existence on the effective date of this constitution are recognized, subject to control and supervision by the State Board of Elementary and Secondary Education and the power of the legislature to enact laws affecting them.

(B) Ouachita Parish and Monroe City School Systems; Board Membership. Only persons residing within the

jurisdiction of the Monroe City School Board shall be eligible to vote for or be members of the Monroe City School Board. Only persons residing in that portion of Ouachita Parish outside the jurisdiction of the Monroe City School Board shall be eligible to vote for or be members of the Ouachita Parish School Board. The position of a member of either board shall be vacated when he no longer satisfies the requirements of this Paragraph. Notwithstanding any contrary provision of this constitution, this Paragraph shall become operative upon the election of members to the Ouachita Parish School Board taking office in 1977 or upon the first reapportionment affecting the Ouachita Parish School Board, whichever occurs earlier.

(C) Consolidation. Subject to approval by a majority of the electors voting, in each system affected, in an election held for that purpose, any two or more school systems may be consolidated as provided by law.

§ 11. Appropriations; State Boards

Section 11. The legislature shall appropriate funds for the operating and administrative expenses of the state boards created by or pursuant to this Article.

§ 12. Appropriations; Higher Education

Section 12. Appropriations for the institutions of higher education shall be made to their managing boards. The funds appropriated shall be administered by the managing boards and used solely as provided by law.

§ 13. Funding; Apportionment

Section 13. (A) Free School Books. The legislature shall appropriate funds to supply free school books and other materials of instruction prescribed by the State Board of Elementary and Secondary Education to the children of this state at the elementary and secondary levels.

(B) Minimum Foundation Program. The State Board of Elementary and Secondary Education, or its successor, shall annually develop and adopt a formula which shall be used to determine the cost of a minimum foundation program of education in all public elementary and secondary schools as well as to equitably allocate the funds to parish and city school systems. Such formula shall provide for a contribution by every city and parish school system. Prior to approval of the formula by the legislature, the legislature may return the formula adopted by the board to the board and may recommend to the board an amended formula for consideration by the board and submission to the legislature for approval. The legislature shall annually appropriate funds sufficient to fully fund the current cost to the state of such a program as determined by applying the approved formula in order to insure a minimum foundation of education in all public elementary and secondary schools. Neither the governor nor the legislature may reduce such appropriation, except that the governor may reduce such appropriation using means provided in the act containing the appropriation provided that any such reduction is consented to in writing by two-thirds of the elected members of each house of the legislature. The funds appropriated shall be equitably allocated to parish and city school systems according to the formula as adopted by the State Board of Elementary and Secondary Education, or its successor, and approved by the legislature prior to making the appropriation. Whenever the legislature fails to approve the formula most recently adopted by the board, or its successor, the last formula adopted by the board, or its successor, and approved by the legislature shall be used for the determination of the cost of the minimum foundation program and for the allocation of funds appropriated.

(C) Local Funds. Local funds for the support of elementary and secondary schools shall be derived from the following sources:

First: Each parish school board, Orleans Parish excepted, and each municipality or city school board actually operating, maintaining, or supporting a separate system of public schools, shall levy annually an ad valorem maintenance tax not to exceed five mills on the dollar of assessed valuation on property subject to such taxation within the parish or city, respectively.

Second: The Orleans Parish School Board shall levy annually a tax not to exceed thirteen mills on the dollar of the assessed valuation of property within the city of New Orleans assessed for city taxation, and shall certify the amount of the tax to the governing authority of the city. The governing authority shall have the tax entered on city tax rolls. The tax shall be collected in the manner, under the conditions, and with the interest and penalties prescribed by law for city taxes. The money thus collected shall be paid daily to the Orleans Parish School Board.

Third: For giving additional support to public elementary and secondary schools, any parish, school district, or subschool district, or any municipality or city school board which supports a separate city system of public schools may levy an ad valorem tax for a specific purpose, when authorized by a majority of the electors voting in the parish, municipality, district, or subdistrict in an election held for that purpose. The amount, duration, and purpose of the tax shall be in accord with any limitation imposed by the legislature.

(D) Municipal School Systems. For the effects and purposes of this Section, the municipalities of Monroe in Ouachita Parish, and Bogalusa in Washington Parish, and no others, shall be regarded and treated as parishes and shall have the authority granted parishes.

§ 14. Tulane University

Section 14. The Tulane University of Louisiana in New Orleans is recognized as created to be developed in accordance with Act No. 43 approved July 5, 1884.

§ 15. Members of State Board of Elementary and Secondary Education; Beginning and End of Terms

Section 15. In order to effectuate the terms of office as provided in Article VIII, Section 3(B), the successors in office to the elected members whose terms end in 1980 and 1982 shall be elected for terms which shall end at noon on the second Monday in March in 1984, and thereafter the successors in office to those members shall be elected and shall take office at the same time as the governor. The successor in office to the elected member whose term ends in 1984 shall be elected for a term which shall end at noon on the second Monday in March in 1988, and thereafter the successor in office to that member shall be elected and shall take office at the same time as the governor. The successors in office to the appointed members whose terms end in 1980 and 1982 shall be appointed for terms which shall end at noon on the second Monday in March in 1984, and thereafter the successors in office to those members shall be appointed for terms which shall be concurrent with the term of the governor making the appointment. The successor in office to the appointed member whose term ends in 1984 shall be appointed for a term which shall end at noon on the second Monday in March in 1988, and thereafter the successors in office to that member shall be appointed for terms which shall be concurrent with the term of the governor making the appointment.

Added by Acts 1979, No. 800, § 1, approved Oct. 27, 1979, eff. Nov. 30, 1979.

La. R.S. § 17:3215. Louisiana State University system

The Louisiana State University system is composed of the institutions under the supervision and management of the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College as follows:

(1) Louisiana State University and Agricultural and Mechanical College, located at Baton Rouge.

(2) The University of New Orleans, located at New Orleans.

(3) Louisiana State University at Alexandria, located at Chambers.

(4) Louisiana State University at Eunice.

(5) Louisiana State University at Shreveport.

(6) The medical center, which shall be composed of and shall administer (1) the medical and related health schools and programs located in New Orleans, Shreveport, and elsewhere in the state, and (2) Confederate Memorial Medical Center at Shreveport.

(7) The Center for Agricultural Sciences and Rural Development which administers the agricultural extension and research programs of the board throughout the State.

(8) Any other college, university, school, institution or program now or hereafter under the supervision and management of the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College.

Added by Acts 1975, No. 313, § 2, eff. July 17, 1975. Amended by Acts 1976, No. 385, § 1, eff. Oct. 1, 1976.

La. R.S. § 17:3216. Southern University system

The Southern University system is composed of the institutions under the supervision and management of the

Board of Supervisors of Southern University and Agricultural and Mechanical College as follows:

(1) Southern University and Agricultural and Mechanical College at Baton Rouge.

(2) Southern University at Shreveport.

(3) Southern University at New Orleans.

(4), (5). Repealed by Acts 1978, No. 683, § 4.

(6) The agricultural extension and research programs administered by the board.

(7) Any other college, university, school, institution or program now or hereafter under the supervision and management of the Board of Supervisors of Southern University and Agricultural and Mechanical College.

La. R.S. § 17:3217. State colleges and universities system

The state colleges and universities system is composed of the institutions under the supervision and management of the Board of Trustees for State Colleges and Universities as follows:

(1) Delgado Community College at New Orleans.

(2) Grambling State University at Grambling.

(3) Louisiana Tech Unversity at Ruston.

(4) McNeese State University at Lake Charles.

(5) Nicholls State University at Thibodaux.

(6) Northeast Louisiana University at Monroe.

(7) Northwestern State University of Louisiana at Natchitoches.

(8) Southeastern Louisiana University at Hammond.

(9) University of Southwestern Louisiana at Lafayette.

(10) Any other college, university, school, institution or program now or hereafter under the supervision and management of the Board of Trustees for State Colleges and Universities.

La. R.S. § 17:3218. Authority of boards over colleges; universities; branches; etc. of university system

The corporate authority, internal and otherwise, vested in the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University, and the Board of Trustees for State Colleges and Universities to supervise and manage the university system under the jurisdiction of each, extends to all the colleges and universities, branches, centers of learning, or extensions of such university system now existing or hereafter established.

La. R.S. § 17:3219. Domicile of boards

The domicile of the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical College, and the Board of Trustees for State Colleges and Universities shall be in East Baton Rouge Parish, and the location shall not be changed except by statute.

La. R.S. § 17:3220. Purposes

A. The Louisiana State University system, the Southern University system, and the college and university system under the supervision and management of the Board of Trustees for State Colleges and Universities are established and maintained to serve the educational needs of the people of the state.

La. R.S. § 17:3221. Designation of universities as land grant colleges of state

Louisiana State University and Agricultural and Mechanical College and Southern University and Agricultural and Mechanical College are hereby designated as the land grant colleges of the state of Louisiana, and as such shall continue legally authorized to accept the benefits of the various acts of Congress, and amendments

thereto, making appropriation for education in agriculture and mechanic arts, military science and tactics, agricultural extension and experimentation, and all other grants to land grant colleges made by the various acts of Congress.

CHAPTER 24. BOARD OF REGENTS

La. R.S. § 17:3121. Board of Regents; creation; membership; terms of office; vacancies

A. The Louisiana Board of Regents, referred to hereinafter in this chapter as the board, is created as a body corporate.

B. The board shall be composed of fifteen members appointed by the governor with the consent of the Senate, who are electors of the state. Members shall be appointed in such manner that at least one but no more than two shall be residents of each congressional district.

C. The terms of the members shall be six years, except that the terms of the initial members shall be as provided in R.S. 17:3122. Members shall serve until their successors are appointed and take office.

D. A vacancy occurrring prior to the expiration of a term shall be filled for the unexpired portion of the term within thirty days after the date on which the vacancy occurs by appointment by the governor, with the consent of the Senate. Within twenty-four hours after being informed of a vacancy on the board, the chairman of the board or the officer exercising his duties shall notify the governor by certified mail of the vacancy and the effective date thereof.

La. R.S. § 17:3121.1. Student membership on the board

A. There shall be one student member of the Board of Regents. The student member shall be elected to the

board by and from the membership of a council composed of the student body presidents-elect of the colleges and universities under the jurisdiction of the board. The board shall establish procedures for the election of the student member by the newly-elected council of student body presidents to assure representation from each management system under the board's jurisdiction within a reasonable number of years to be established by the board. The newly-elected council of student body presidents shall meet upon the call of the incumbent student member. Such meeting shall occur after the spring election of all student body presidents of the member colleges and universities and before May 31 of each year. The initial student member shall be elected prior to September 1, 1981, by and from the membership of such council and as otherwise provided by the board and shall serve through May 31, 1982.

B. The student member shall be elected for a one-year term beginning on June first of each year, except that the student member elected for a term beginning on June 1, 1988, shall serve only until September 1, 1988. A student member shall be elected in the manner provided in Subsection A herein and as otherwise provided by the board for a one-year term beginning September 1, 1988; thereafter, a student member shall be elected for a one-year term beginning on September first of each year. The student member shall serve until his successor takes office.

C. The student member shall have all the privileges and rights of other board members and shall receive the same per diem, travel, and other expenses as other members of the board.

D. A vacancy in the office of the student member shall be filled for the unexpired portion of the term in the manner provided in Subsection A herein and as otherwise provided by the board.

Added by Acts 1981, No. 275, § 1, eff. July 13, 1981.

La. R.S. § 17:3122. Initial members of board; term of office

A. Each member of the Louisiana Coordinating Council for Higher Education created by Article XII, Section 7 of the Louisiana Constitution of 1921 appointed by the governor whose term had not expired on December 31, 1974, shall become an initial member of the Louisiana Board of Regents until the term to which he was appointed expires. No later than January 5, 1975, the governor shall appoint such additional initial members as are necessary to complete the membership of the board. In making his appointments the governor shall designate the expiration date of the term to which each initial member is appointed. Such designation shall be made in such manner as to cause the terms of five initial members to expire in 1976, five in 1978 and five in 1980. The appointment of initial members shall be made in accordance with the provisions of R.S. 17:3121(B).

B. Any vacancy in the office of an initial member shall be filled as provided in R.S. 17:312(D).

La. R.S. § 17:3123. Domicile; organization and meetings of board

A. The board shall be domiciled in the city of Baton Rouge, parish of East Bator Rouge.

B. The members of the board shall elect from among their number a chairman and a vice-chairman and such other officers as they deem necessary, whose terms shall be fixed by the board.

C. Eight members of the board shall constitute a quorum for the transaction of business and all official action of the board shall require the favorable vote of a majority of the members of the board.

D. The board shall adopt rules for the transaction of its business and shall keep an accurate record of all of its proceedings and official actions. All papers, documents and records appertaining to the board shall be filed at the domicile of the board.

E. The board shall meet on or before the second Monday in January of each year, at other times as fixed by the board, or upon call of the chairman. The board shall meet at least twice yearly with the State Board of Elementary and Secondary Education in accordance with the provisions of Paragraph D of Section 5 of Article VIII of the Louisiana Constitution of 1974.

F. The first meeting of the board shall be held in Baton Rouge on the call of the governor within ten days after the appointment by the governor of initial members of the board. In no event shall the first meeting of the board be held later than January 15, 1975.

La. R.S. § 17:3124. Transitional provisions

A. The Louisiana Coordinating Council for Higher Education created by Section 7 of Article XII of the Louisiana Constitution of 1921 shall continue to have and exercise all power and authority granted to and perform all functions provided for such board by the Louisiana Constitution of 1921 or by law until the first meeting of the Louisiana Board of Regents is held as provided in R.S. 17:3123.

B. On and after the date of the first meeting of the board, the contractual obligations heretofore incurred by the Louisiana Coordinating Council for Higher Education shall be discharged by the Louisiana Board of Regents. All books, papers, records, money and other property heretofore owned, possessed, controlled or used by the Louisiana Coordinating Council for Higher Education in the exercise of its functions and, to the extent practicable and necessary, all employees heretofore engaged in the performance of the functions of the Louisiana Coordinating Council for Higher Education are hereby transferred to the Louisiana Board of Regents effective on the date of the first meeting of the board and subject to all applicable state civil service rules and regulations and those of the applicable employees' retirement systems.

La. R.S. § 17:3125. Power to revise or eliminate programs

The Board of Regents shall have the power to revise or eliminate an existing degree program, department of instruction, division, or similar subdivision of any public institution of higher education.

La. R.S. § 17:3126. Power to disapprove; approve; or modify

A. The Board of Regents shall have the power to approve, disapprove, or modify a proposed degree program, department of instruction, division or similar subdivision.

B. No college or university may institute a new degree program or department of instruction, division, or similar subdivision without approval of the Board of Regents. Application to the Board of Regents for such a new program, department of instruction, division or similar subdivision shall be made by the management board governing the college or university at which the program is to be instituted.

La. R.S. § 17:3127. Power with respect to new institutions

The Board of Regents shall have the power to study the need for and feasibility of any new institution of post-secondary education, including branches of institutions and conversion of two-year institutions to institutions offering longer courses of study. If the creation of a new institution, the addition of another management board, or the transfer of an existing institution from one board to another is proposed the Board of Regents shall report its written findings and recommendations to the legislature within one year. Only after the report has been filed, or, after one year if no report is filed, may the legislature take affirmative action on such a proposal

atnd then only by law enacted by two-thirds of the elected members of each house.

La. R.S. § 17:3128. Power to formulate master plan; mission establishment

A. The Board of Regents shall have the power to formulate and make timely revision of a master plan for higher education. As a minimum, the plan shall include a formula for equitable distribution of funds to the institutions of higher education. The board shall submit its recommended plan and recommended formula for funding to the governor, the legislature, and the management boards for institutions of higher education.

B. (1) In cooperation and agreement with each higher education management board, the chancellor, and the president of each public institution of higher education, the Board of Regents shall devise, describe, and establish a mission for each public university system and for each institution within each system. Each mission statement shall be included in and form the basis of the master plan provided for in Subsection A of this Section. Initial mission statements shall be completed no later than January 15, 1989, shall be reviewed at least annually, and shall be individually revised as often thereafter as is necessary to achieve and maintain the institutional balance necessary to diversity, access, and excellence.

(2) The Board of Regents shall, no later than January 20, 1989, provide the initial mission statements developed pursuant to this Section to the governor and the legislature and shall include, at that time, recommendations for legislative or gubernational action necessary to support the development of each system and institution as provided in their mission statement. Annually thereafter, the board shall report to the legislature and the governor on the status of higher education relative to the mission statements, including in such report all revisions since

the last report and any recommendations for legislative or gubernatorial action.

(3) Each mission statement devised pursuant to this Section shall include a description of:

(a) The intended role and scope of each system and institution, describing with some specificity its geographic service area and the student population intended to be served;

(b) Its public service contribution;

(c) Its academic and research goals, particularly describing programs being emphasized; and

(d) Its contribution toward, and proper role in, the collective goals of public higher education of diversity, access, and excellence.

La. R.S. § 17:3128.1. Power to survey, evaluate, and implement incubator facilities on state college and university campuses

A. The Board of Regents shall conduct a survey of state colleges and universities for the purpose of establishing incubator facilities as defined in R.S. 51:1122(4) on qualified campuses. In order to complete such study, the board shall establish criteria for evaluation of institutions which shall include, but not be limited to the following information:

(1) Computer capabilities.

(2) Qualified personnel.

(3) Qualified student manpower.

(4) Research laboratories and support facilities.

B. The board shall use the criteria established pursuant to Subsection A in order to evaluate the potential for incubator facilities on campuses and recommend such facilities on qualified campuses.

C. The board shall report criteria established, data developed, and other relevant information and shall make recommendations for implementation of incubator facilities to the governor, the speaker of the House of Representatives, the president of the Senate, the chairmen of the House Committee on Commerce and the Senate Committee on Commerce, the chairman of the Small Business Development Corporation, and the secretary of the state Department of Economic Development pursuant to its study no later than January 1, 1987.

La. R.S. § 17:3129. Power to recommend budget

A. The Board of Regents may require that every higher education management board submit to it, at a time it specifies, an annual budget proposal for operational and capital needs of each institution under the control of each management board.

B. The Board of Regents shall submit to the governor and to the legislature its budget recommendations for all institutions of higher learning in the state, including priorities for capital construction and improvements.

C. The legislature shall appropriate funds for the operating and administrative expenses of the state boards created by or pursuant to Article VIII of the Louisiana Constitution of 1974. Appropriations for the institutions of higher education shall be made to their managing boards. The funds appropriated shall be administered by the managing boards and used solely as provided by law.

La. R.S. § 17:3129.1. Power with respect to a research and development program; advisory committee

A. The Board of Regents is hereby authorized to formulate and conduct a research and development program to undertake, foster, and otherwise encourage basic research to promote the advancement of this state. In order to effectuate such purposes, the Board of Regents shall have the following basic powers:

(1) To take action to promote strong links between industry and the public and independent colleges and universities in the state in conducting research.

(2) To seek ways and means of diversifying the economy of the state.

(3) To promote new techonolgy.

(4) To research potential new sources of energy.

(5) To seek financial assistance from any public or private person, or agency, including the federal government, or foundation.

(6) To serve as the focal point for academic and scholarly research and development activities of the state.

(7) To enter into contracts with public and independent colleges and universities and nonprofit research entities with respect to specified research projects.

(8) To create the advisory committee on research and development provided for in Subsection B hereof, and

(9) To perform such other functions that are necessary or incidental to the promotion of basic academic and scholarly research related to the future of the state.

(10) To establish a research center for the evaluation of technological innovations which may be applied to the encouragement and development of small businesses in the state.

B. For purposes of assisting the Board of Regents in promoting basic research, the board may appoint an eleven member advisory committee on research and development which members shall be representative of industrial, scientific, and economic interests of the state. The secretary of the State Department of Economic Development shall be included as one of the eleven members of the advisory committee. No member of the advisory committee shall be a faculty member, or official, or employee,

of any college or university. It shall be the function of the advisory committee to consider, review, and suggest modifications of possible research projects submitted to it by the board, and otherwise assist the board. All members of the committee shall serve four-year terms. The members of the committee may not be compensated for their services, but may be reimbursed for expenses in accordance with regulations of the Division of Administration.

Amended by Acts 1986, No. 756, § 1.

C. (1) As part of the research and development program authorized by this Section, the Board of Regents is authorized to establish and conduct a research grants program to:

(a) Generate and foster research necessary for the human and economic development of the state.

(b) Strengthen the research capabilities and research environment of Louisiana's institutions of higher education, and thereby to strengthen their faculties and graduate programs.

(c) Increase the number of high quality researchers in the state and enhance the research opportunities for scientists and engineers in the state.

(2) From federal, state, private, and other funds available for the purposes of the program, the Board of Regents shall award grants to fund basic research to carry out the purposes of the program. The Board of Regents, with the advice of the Advisory Committee on Research and Development, shall adopt and promulgate rules of procedure for the awarding of such grants. The board shall adopt such rules pursuant to R.S. 17:3133 and the rules shall become effective only after approval by the education committees of the Senate and House of Representatives.

(3) The rules of procedure adopted pursuant to Paragraph (2) above shall require at a minimum that:

(a) The Board of Regents adopt and periodically revise a state research and development plan to meet the goals of the program, which plan shall identify areas of state concern requiring research and shall identify options and strategies to meet program goals.

(b) Proposals for grants be submitted to the board and grants be awarded annually, though a grant may be for a period greater than one year.

(c) Public or independent colleges or universities in the state and nonprofit research entities in the state, and units of and researchers affiliated with such institutions and entities, be eligible as grant recipients.

(d) Grants be awarded to develop or strengthen centers or institutes, to support the research of individual researchers, or both.

(e) Proposals for which grants are awarded will serve the goals of the program, are within the research areas and in accord with the strategies contained in the current research and development plan, and meet any other criteria which the board may include in the rules of procedure.

(f) Proposals be assessed by the board in accordance with such procedures as the rules may prescribe which procedures shall include, at a minimum, rigorous peer review.

(g) Research funded through the grants program be monitored and assessed through on-site visits, periodic progress reports, and peer reviews.

La. R.S. § 17:3129.2. Louisiana Higher Education Executive Advisory Committee; members; executive committee; meetings; functions

A. (1) There is hereby established within the Department of Education the Louisiana Higher Education

Executive Advisory Committee. The committee shall be comprised of the following members:

(a) The commissioner of higher education, who shall serve as chairman;

(b) The president of the Louisiana Association of Independent Colleges and Universities and each of its member institutions;

(c) The president of the Louisiana State University system;

(d) The president of the Southern University system;

(e) The executive director of the Board of Trustees for State Colleges and Universities;

(f) The chancellors of the Louisiana State University system;

(g) The chancellors of the Southern University system;

(h) The presidents of each of the colleges and universities under the supervision of the Board of Trustees for State Colleges and Universities; and

(i) The presidents of Bossier Parish Community College and St. Bernard Parish Community College.

(2) The members of the committee may not be compensated for their services.

B. The committee shall establish an executive committee, which shall consist of the commissioner of higher education, the president of the Louisiana Association of Independent Colleges and Universities, the president of the Louisiana State University system, the president of the Southern University system, and the president of the Board of Trustees for State Colleges and Universities.

C. The committee shall meet at least once annually, at the invitation of and at a location determined by the chairman. Special meetings may be held upon call of the chairman.

D. It shall be the function of the committee to consider matters relating to education and to make recom-

mendations to the Board of Regents as the committee deems necessary.

La. R.S. § 17:3129.3. Louisiana Higher Education Tuition Plan Advisory Committee; members, purpose, report

A.(1) There is hereby created under the jurisdiction of the Board of Regents the Louisiana Higher Education Tuition Plan Advisory Committee whose purpose shall be to study all aspects of prepaid tuition plans and educational savings plans, in order to evaluate the feasibility of developing and implementing a plan in Louisiana, and if such a plan is feasible, to make recommendations to the legislature concerning the kind of plan that is appropriate for the needs of the citizens of Louisiana.

(2) The advisory committee shall be composed of ten members as follows:

(a) The commissioner of higher education, or his designee, who shall serve as chairman.

(b) The president of the Louisiana Association of Independent Colleges and Universities or his designee.

(c) One member from the office of the state treasurer, appointed by the state treasurer.

(d) One member from the division of administration, appointed by the commissioner of administration.

(e) The chairman of the House Committee on Education or his designee.

(f) The chairman of the Senate Committee on Education or his designee.

(g) The chairman of the House Appropriations Committee or his designee.

(h) The chairman of the Senate Finance Committee or his designee.

(i) One member of the Louisiana Higher Education Executive Advisory Committee, appointed by the committee.

(j) One member of the Governor's Special Commission on Education Services appointed by the chairman.

(3) The members of the committee shall not be compensated for their services.

B. The committee shall review those prepaid tuition plans and educational savings plans that presently exist, assess the feasibility of a plan in Louisiana, and, if feasible, the committee shall make recommendations as provided in this Section. Such assessment of feasibility shall be based on data specific to Louisiana, including but not limited to demographic studies to show market and need, average income levels, projected college and university enrollments including the numbers of traditional, part-time, older, and full-time students, and potential participation by the private sector, in order to advise the legislature with respect to the kind of plan that is most appropriate for the citizens of Louisiana.

C. The committee shall report its findings and recommendations to the House Committee on Education and the Senate Committee on Education acting as a joint committee not later than sixty days prior to the 1989 Regular Session of the legislature.

D. The committee shall terminate on August 1, 1989.

La. R.S. § 17:3130. Other powers

All powers of management over public institutions of higher education not specifically vested in the Board of Regents by Article VIII, Section 5(d) of the Louisiana Constitution of 1974, are reserved to the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical

College, and the Board of Trustees for State Colleges and Universities, as to the institutions under the control of each.

La. R.S. § 17:3131. Orders

Orders of the Board of Regents issued pursuant to its powers as provided in R.S. 17:3125 to 17:3129 shall be promulgated and issued to the appropriate management board for enforcement and implementation.

La. R.S. § 17:3132. Channels of communication

All requests by the Board of Regents for information and all other communications relative to the exercise of its powers shall be forwarded to the chairman of the appropriate management board, through its secretary, and each management board shall be responsible for providing within a reasonable time the information requested.

La. R.S. § 17:3133. Public hearings; due process

In exercising and fulfilling its powers, duties and functions as specifically enumerated in Article VIII, Section 5(D), paragraphs (1), and (4) of the constitution, the Board of Regents shall before adopting or issuing an order, rule, regulation, plan, policy or recommendation, hold public hearings at which all students, faculty, staff, administrators, management boards and interested citizens may appear and present testimony. The Board of Regents shall accompany each such order, rule, regulation, plan, policy and recommendation with written reasons therefor, explaining in detail the reasons for its actions.

LOUISIANA EDUCATION TUITION AND SAVINGS PLAN—GUARANTEED PREPAID TUITION AND EDUCATIONAL SAVINGS PLANS

ACT NO. 252

H.B.No. 1662

AN ACT to enact R.S. 17:3129.4, relative to guaranteed prepaid tuition and educational savings programs; to authorize the Board of Regents, or its successor, to formulate, develop, adopt, implement, and administer, a guaranteed prepaid tuition program for certain public higher education expenses; to authorize the Board of Regents, or its successor, to formulate, develop, adopt, implement, and administer an educational savings program based on issuance by the state of interest bearing education notes redeemable for certain higher education expenses; to provide program guidelines; to provide for the adoption of rules and regulations, to create the Louisiana Education Tuition and Savings Fund as a special fund in the state treasury; to provide for the management of the fund and for the investment of fund revenues; to provide for a source of money for the fund; to provide for the disposition of monies in the fund; to provide for an effective date, and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 17:3129.4 is hereby enacted to read as follows:

§ 3129.4. Louisiana Education Tuition and Savings Plan and Fund

A. The Board of Regents, or its successor, is authorized to formulate, develop, adopt, implement, and then manage and otherwise administer the Louisiana Educa-

tion Tuition and Savings Plan which shall be comprised of both a guaranteed prepaid tuition program and an educational savings program based on issuance of interest bearing education notes. Prior to adoption by the Board of Regents, the board shall submit the proposed plan in writing to the House and Senate Committees on Education for review and comment.

B. The Board of Regents is authorized to adopt appropriate and necessary rules, regulations, and program guidelines to implement an education savings program based on issuance by the state of interest bearing education notes. Such rules, regulations, and program guidelines shall be consistent with the provisions of this Section relating to the education savings plan and shall include but not be limited to the following:

(1) The program shall be designed to allow parents and other eligible participants to purchase, at a discounted rate, interest bearing education notes issued by the state in the name of a qualified beneficiary and redeemable for permitted educational expenses incurred by the beneficiary upon acceptance by and matriculation at any public or private institution of higher education in the state.

(2) Eligible participants shall include parents, family members, and other persons, within or without the state; however, the qualified beneficiary shall be a Louisiana resident at the time of purchase of the note. The program shall include provisions setting forth the circumstances and terms under which a purchaser of an education note may substitute one qualified person for another as a beneficiary.

(3) The education notes shall be marketed in various denominations, including fifty and one hundred dollar denominations, shall have from five to twenty year maturities, and shall pay accrued interest upon matruity as provided for by the program.

(4) Interest earned by the purchaser on an education note shall be exempt from Louisiana income tax.

(5) The program shall provide that if a qualified beneficiary is not admitted to a state public or private institution of higher education or chooses to attend an out-of-state higher education institution, the purchaser of the education note may redeem the note, minus administrative fees, with a substantial penalty applied to the return of accrued interest which shall be provided for by the rules.

(6) The program shall permit a purchaser of an education note to redeem the note upon the death or permanent and total disability of the qualified beneficiary without penalty. The program also shall provide for other circumstances when the education note is not or cannot be used for permitted purposes.

C. The Board of Regents is authorized to adopt appropriate and necessary rules, regulations, and program guidelines to implement a guaranteed prepaid tuition plan. Such rules, regulations, and program guidelines shall be consistent with the provisions of this Section relative to the guaranteed prepaid tuition plan and shall include but not be limited to the following:

(1) The program shall be designed to allow parents and other eligible participants to pay a one-time only, lump-sum payment into an interest-bearing account in the state treasury in the name of a qualified beneficiary for permitted public higher education expenses. The account shall serve a pool for the participants' contributions and for investment by the state in such a manner that upon a qualified beneficiary's acceptance by and matriculation at a state institution of public higher education, the tuition of such beneficiary shall be paid by the state for the time period specified in the participation agreement.

(2) Eligible participants shall include parents, family members, and other persons, within or without the state;

however, the qualified beneficiary shall be a Louisiana resident at the time of payment into the account. The program shall include a provision setting forth the circumstances and terms under which a participant may substitute one qualified person for another as a beneficiary.

(3) All contributions to the guaranteed tuition prepayment program shall be deductible from a participant's Louisiana income tax.

(4) Qualified beneficiaries shall be considered state residents for tuition purposes notwithstanding their legal residence at the time of matriculation.

(5) The program shall provide that if a qualified beneficiary is not admitted to a state public institution of higher education, chooses to attend a private state higher education institution, or chooses to attend an out-of-state higher education institution, the program participant may withdraw the investment, minus administrative fees, with a substantial penalty applied to the return of accrued interest which shall be provided for by the rules.

(6) The program also shall permit the return of the investment of any program participant upon the death or permanent and total disability of the qualified beneficiary without penalty. The rules shall provide also for the return of the investment of any program participant under other circumstances when the funds are not or cannot be used for permitted purposes.

D.(1) There shall be established in the state treasury as a special permanent fund the Louisiana Education Tuition and Savings Fund, hereinafter referred to as the "Tuition and Savings Fund." The fund shall be comprised of separate accounts for the guaranteed prepaid tuition program and for the educational savings program authorized by this Section. All revenues and interest earnings generated pursuant to programs of the Louisiana Education Tuition and Savings Plan shall be credited to

their respective fund accounts. The monies in this fund shall be used solely to finance the permitted educational benefits provided by the respective programs. All unexpended and unencumbered monies in fund accounts at the end of a fiscal year shall remain in such fund accounts and be available for appropriation in the next fiscal year. The monies in this fund shall be invested by the state treasurer in accordance with state law and as provided for by program rules, regulations, and guidelines, and interest earned on the investment of these monies shall be credited to the respective fund accounts, following compliance with the requirement of Article VII, Section 9(B) of the constitution relative to the Bond Security and Redemption Fund.

(2) The legislature shall make yearly appropriations from the fund to the Board of Regents for the purposes established by this Section.

Section 2. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided in Article III, Section 18 of the Constitution of Louisiana.

Approved June 26, 1989.

STATE COLLEGE OR UNIVERSITY TUITION FOR NEEDY STUDENTS—PAYMENT BY STATE

ACT NO. 789

S.B.No. 280

AN ACT to enact R.S. 17:3026, relative to higher education assistance; to provide relative to the provision by the state of tuition to all needy, qualified, college-bound state residents; to provide relative to qualifications for such tuition assistance; to provide for the administration of such assistance; to provide relative to the funding for such assistance; to provide limitations; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 17:3026 is hereby enacted to read as follows:

§ 3026. College or university tuition; guarantee; eligibility; administration

A. (1) The tuition at any public college or university in the state shall be paid by the state on behalf of any student who enrolls in such a school to pursue a baccalaureate degree, who applies therefor, and who meets all of the following qualifications:

(a) Has actually resided in Louisiana during the twenty-four months preceding college or university enrollment.

(b) Has a parent or guardian who is a domiciliary of Louisiana.

(c) Has graduated from high school within the two years preceding the application with a minimum cumulative grade point average of 2.5 calculated on a 4.0 scale.

(d) Has successfully completed seventeen and one-half units of high school coursework (ninth grade level or higher), which constitutes a core curriculum and meets standards for admission to the desired college or university. The core curriculum shall be defined as follows:

(i) English I, II, III, and IV (four units).

(ii) Algebra I and II (two units).

(iii) Geometry, Trigonometry, Calculus, or comparable Advanced Mathematics (one unit).

(iv) Biology (one unit).

(v) Chemistry (one unit).

(vi) Earth Science, Environmental Science, or Physics (one unit).

(vii) American History (one unit).

(viii) World History, World Cultures, Western Civilization, or World Geography (one unit).

(ix) Civics and/or Economics (one unit).

(x) Fine Arts Survey (one unit; or substitute two units of performance courses in music, dance, or theatre; or substitute two units of studio art courses).

(xi) Foreign Language (two units in a single language).

(xii) Computer Science, Computer Literacy, or Data Processing (one-half unit).

(xiii) Electives from the above (one unit).

(e) Has a composite score on the American College Test of at least eighteen.

(f) Has no criminal record.

(g) Is found to be in financial need.

(2) In each year, a public college or university may admit students who qualify for payment of their tuition as provided in this Section provided that said students meet at least two of the requirements enumerated in Subparagraphs (c) through (e) of Paragraph (1) of this Subsection and fail to meet eligibility for the third by an amount equal to ten percent or less. The total number of such students shall not exceed ten percent of the total number of students admitted the previous year who received tuition as provided in this Section.

(3) To maintain continued state payment of tuition once enrolled in college a student shall meet all of the following:

(a) Make steady academic progress toward a degree, earning not less than the minimum number of hours of credit required for fulltime standing in each academic period requiring such enrollment.

(b) Maintain fulltime enrollment standing for not less than two semesters or three quarters in any academic year.

(c) Rank in the upper fifty percent of the total number of his classmates in the college in which he is enrolled or the division, if he is not enrolled in a college, within the institution of higher education.

(d) Have no criminal record.

B. (1) The provisions of this Section shall be administered by the Board of Regents, or its successor. The commission may provide by rule adopted as provided by the Administrative Procedure Act for all matters necessary to the implementation of this Section.

(2) By rule, the commission shall provide for:

(a) A mechanism for informing all students of the availabilty of the assistance provided pursuant to this Section early enough in their schooling that a salutary motivational effect is possible.

(b) Applications, forms, financial audit procedures, eligibility and other program audit procedures, and other matters related to efficient operation.

C. An applicant shall be found to be in financial need if:

(1) The family has one child under the age of twenty-one who is not emancipated and the four-year average adjusted gross income of the family is less than twenty-five thousand dollars.

(2) The family has two children under the age of twenty-one who are not emancipated and the four-year average annual adjusted gross income of the family is less than thirty thousand dollars.

(3) The family has three or more children under the age of twenty-one who are not emancipated and the four-

year average annual adjusted gross income of the family is less thn thirty-five thousand dollars.

The four-year average annual adjusted gross income of the family shall be verified by Internal Revenue Service returns.

D. An appropriation of funds may annually be made to the commission sufficent to cover, in addition to any other available funds, the costs of tuition required to be paid, both initial and continuing, for the coming school year. All such payments shall be made directly to the institution to which such tuition is due after notice to the school that the state shall pay the tuition of a student and after notice from the school that the student has actually enrolled.

E. The commission may seek, accept, and expend funds from any source, including private business, industry, foundations, and other groups as well as any federal or other governmental funding available for this purpose.

F. No student shall receive a grant pursuant to this Section in an amount greater than the tuition charged by the school. The student must apply for a federal grant prior to receiving state funds.

G. The cost of the program provided for by R.S. 17:3026 shall not exceed one million nine hundred thousand dollars for the 1989-1990 Fiscal Year.

Approved July 10, 1989.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

Civil Action No. 74-68

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA: LOUISIANA STATE BOARD OF EDUCATION: EDWARD BOPP, as President of the Louisiana State Board of Education; EARL INGRAM, as Acting Director of the Louisiana State Board of Education, LEWIS MICHOT, as ex officio secretary of the Louisiana State Board of Education; JESSE BANKSTON, FREDERICK EAGAN, HARVEY PELTIER, ROBERT CURRY, W. E. WHETSTONE, BOYD WOODARD, A. J. ROY, CHARLES COLBERT, RICHARD D'AQUIN, ENOCH NIX, Members of the Louisiana State Board of Education; LOUISIANA COORDINATING COUNCIL FOR HIGHER EDUCATION: WILLIAM ARCENEAUX, as Executive Director of the Louisiana Coordinating Council for Higher Education; JESSE BANKSTON, W. J. DEFELICE, MRS. MOSIE W. DENNERY, ALBERT W. DENT, EWELL EAGAN, FRED C. FREY, EUGENE G. GOUAUX, J. K. HAYNES, THOMAS JAMES, TROY MIDDLETON, LEONARD W. PHILLIPS, JOE D. SMITH JR., A. L. SWANSON, JOHN PHISTLETHWAITE, D. S. YOUNG, Members of the Louisiana Coordinating Council for Higher Education; LOUISIANA STATE BOARD OF SUPERVISORS: CARLOS G. SPAHT, as Chairman of the Louisiana State Board of Supervisors; EDWIN W. EDWARDS, as ex officio member; WILLIAM T. BROWN, JIMMY H. DAVIS, GORDON E. DORE, MURPHY J. FOSTER, A. EGLIN MCKEITHEN, LEWIS H. PADGETT, WILLIAM

S. PECK, JAMES R. PELTIER, SARGENT PITCHER, JOHN SHERROUSE, JR., JAMES T. STAPLES, OLIVER P. STOCKWELL, A. L. SWANSON, Members of the Louisiana State Board of Supervisors; LOUISIANA BOARD OF REGENTS: WILLIAM ARCENEAUX, JESSE BANKSTON, EDWARD BOPP, WILLIAM T. BROWN, CHARLES COLBERT, ROBERT CURRY, RICHARD D'AQUIN, JIMMY H. DAVIS, W. J. DEFELICE, MOSIE W. DENNERY, ALBERT W. DENT, GORDON E. DORE, EWELL EAGAN, FREDERICK EAGAN, MURPHY J. FOSTER, FRED C. FREY, EUGENE G. GOUAUX, J. K. HAYNES, THOMAS JAMES, A. EGLIN MCKEITHEN, TROY MIDDLETON, ENOCH NIX, LEWIS H. PADGETT, WILLIAM S. PECK, HARVEY PELTIER, JAMES R. PELTIER, LEONARD W. PHILLIPS, JOHN PHISTLETHWAITE, SARGENT PITCHER, A. J. ROY, JOHN SHERROUSE, JR., JOE D. SMITH, JR., CARLOS SPAHT, JAMES T. STAPLES, OLIVER P. STOCKWELL, A. L. SWANSON, W. E. WHETSTONE, BOYD WOODARD, D. S. YOUNG, Members of the Louisiana Board of Regents,

Defendants,

COMPLAINT

[Filed March 14, 1974]

The United States of America alleges that:

1. This action is brought by the Attorney General on behalf of the United States pursuant to Sections 601 and 602 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, 2000d-1, and the Fourteenth Amendment to the Constitution of the United States.

2. This Court has jurisdiction of this action under Sections 601 and 602 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, 2000d-1, and under 28 U.S.C. 1345.

3. The defendant State of Louisiana is a state of the United States.

4. The defendant Louisiana State Board of Education is the agency under the laws of the State of Louisiana

which is responsible for the general administration and supervision of all schools which comprise the statewide public school system of higher education within Louisiana with the exception of Louisiana State University and Agricultural and Mechanical College. In that capacity, the defendant Louisiana State Board of Education is authorized to receive and use federal funds for public school purposes. The defendant Louisiana State Board of Education meets and maintains its records in Baton Rouge, Louisiana.

5. Defendant Edward Bopp is President of the Louisiana State Board of Education, Earl Ingram is Acting Director, Lewis Michot is ex officio secretary, and Jesse Bankston, Frederick Eagan, Harvey Peltier, Robert Curry, W.E. Whetstone, Boyd Woodard, A.J. Roy, Charles Colbert, Richard D'Aquin, Enoch Nix are members. The President, Acting Director, ex officio secretary, and each member of the Board reside in the State of Louisiana.

6. Defendant Louisiana Coordinating Council for Higher Education of the State of Louisiana is the agency under the laws of the State of Louisiana which is responsible for the supervision of all public boards, departments and agencies of higher education within the State of Louisiana. Under state law the defendant Louisiana Coordinating Council for Higher Education is charged with the responsibility of approving or disapproving new degree programs for institutions of higher education within the State of Louisiana, reviewing programs of instruction and research, obtaining statistical information from those institutions of higher education, and disseminating information to officials of the State of Louisiana regarding the utilization of federal monies in order to avoid duplication of State efforts in the area of higher education. The defendant Louisiana Coordinating Council for Higher Education of the State of Louisiana meets and maintains its records in Baton Rouge, Louisiana.

7. William Arceneaux is Executive Director of the Louisiana Coordinating Council for Higher Education and Jesse Bankston, W. J. Defelice, Mosie W. Dennery, Albert W. Dent, Ewell Eagan, Fred C. Frey, Eugene G. Gouaux, J. K. Haynes, Thomas James, Troy Middleton, Leonard W. Phillips, Joe D. Smith, A. L. Swanson, John Phistlethwaite, D. S. Young are its members. William Arceneaux and each of the members reside within the State of Louisiana.

8. The Louisiana State Board of Supervisors is the agency under the laws of the State of Louisiana which operates, governs, and administers Louisiana State University and Agricultural and Mechanical College. Its principal office is in Baton Rouge, Louisiana.

9. The members of the Louisiana State Board of Supervisors are Carlos G. Spaht, Chairman, and William T. Brown, Jimmy H. Davis, Gordon E. Dore, Edwin W. Edwards, Murphy J. Foster, A. Eglin McKeithen, Lewis H. Padgett, Jr., William Peck, Sargent Pitcher, John Sherrouse, Jr., James T. Staples, Oliver P. Stockwell, and A. L. Swanson. Each of the members resides within the State of Louisiana.

10. Louisiana Acts of 1972, No. 712 § 1 creates the defendant Louisiana Board of Regents and provides that beginning July 1, 1974, the Louisiana Board of Regents will be responsible for the government, supervision, management, administration and direction of all public institutions of higher education within the State of Louisiana. The defendant Louisiana Board of Regents meets and maintains its records in Baton Rouge, Louisiana.

11. Defendants William Arceneaux, Jesse Bankston, Edward Bopp, William T. Brown, Charles Colbert, Robert Curry, Richard D'Aquin, Jimmy H. Davis, W. J. Defelice, Mosie W. Dennery, Albert W. Dent, Gordon E. Dore, Ewell Eagan, Frederick Eagan, Murphy J. Foster, Fred C. Frey, Eugene G. Gouaux, J. K. Haynes, Thomas

James, A. Eglin McKeithen, Troy Middleton, Enoch Nix, Lewis H. Padgett, William S. Peck, Harvey Peltier, James R. Peltier, Leonard W. Phillips, John Phistlethwaite, Sargent Pitcher, A. J. Roy, John Sherrouse, Jr., Joe D. Smith, Jr., Carlos Spaht, James T. Staples, Oliver P. Stockwell, A. L. Swanson, W. E. Whetstone, Boyd Woodard, D. S. Young are members of the Louisiana Board of Regents. Each member of the Louisiana Board of Regents resides within the State of Louisiana.

12. The defendants named in paragraph 3, 4, 5, 6, 7, 8, 9, 10, and 11 have the collective responsibility under Louisiana law of operating the Louisiana statewide system of public higher education.

13. Publicly financed higher education in Louisiana is paid for primarily with state and federal funds. Defendants and their agents, at all times material, have been receiving and continue to receive, federal financial assistance for their state supported institutions of higher education.

14. Defendants, by their agents or predecessors, in consideration for federal financial assistance, have agreed to comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.) and with all requirements imposed by or pursuant to the regulations of the Department of Health, Education and Welfare (45 CFR Part 80) issued pursuant to that Title.

15. Title VI of the Civil Rights Act of 1964, and the regulations issued to effectuate the provisions of Title VI (45 CFR Part 80), provide that no person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Health, Education and Welfare. The regulations provide that all programs and facilities must be conducted or operated in

compliance with all requirements imposed by or pursuant to Title VI. The regulations further provide that upon determination by the Department of Health, Education and Welfare that a recipient of federal funds is in non-compliance with Title VI or the regulations issued pursuant to Title VI, that the United States has the right to seek judicial enforcement of Title VI of the Civil Rights Act of 1964.

On January 13, 1969, October 21, 1969, May 21, 1973, and November 10, 1973 authorized representatives of the Department of Health, Education and Welfare sent letters to the appropriate agents of the defendant State of Louisiana advising that the State of Louisiana operates a racially dual system of public higher education in violation of Title VI of the Civil Rights Act of 1964. The letters requested a statewide higher education desegregation plan, and the November 10, 1973 letter stated that:

> "if by November 30, 1973, I have not received a satisfactory commitment to comply with Title VI, as set forth at the beginning of this letter, I will have no alternative but to initiate enforcement action to secure compliance with Title VI by Louisiana's Systems of Higher Education."

17. The defendants herein have taken the position that the Louisiana system of public higher education complies with Title VI and the Fourteenth Amendment to the Constitution.

18. The defendants herein have failed and refused to submit a constitutionally acceptable plan to disestablish the racially dual system of public higher education in the State of Louisiana.

19. Because the defendant State of Louisiana and its agents failed to submit a constitutionally acceptable plan to disestablish the dual system of higher education existing within Louisiana, on January 11, 1974, the General Counsel of the Department of Health, Education and

Welfare, pursuant to Section 602 of Title VI, 42 U.S.C. 2000d-1 and Sections 80.8(a) and (d) of the Code of Federal Regulations, wrote to the Assistant Attorney General for Civil Rights of the United States Department of Justice, and recommended that appropriate judicial proceedings be brought to enforce the rights of the United States.

20. Acting pursuant to Louisiana law and usage, defendants and their agents have established and perpetuated dualism based upon race in the operation of state institutions of higher education by constructing and maintaining institutions of higher learning designed to serve students of a particular race.

A. Louisiana State University and Agricultural and Mechanical College at Baton Rouge, Louisiana was established in 1876 and originally served only white students. Acts of 1876, No. 145.

B. Southern University at Baton Rouge, Louisiana was established in 1880 as an "institution for the education of persons of color." Acts of 1880, No. 87. The institution originally served only black students.

C. Louisiana Polytechnic Institute at Ruston, Louisiana in Lincoln Parish was established in 1894 as an institution for "whites." Acts of 1894, No. 68.

D. In 1928, the State of Louisiana took over control of the Lincoln Parish Training School at Grambling, Louisiana, which had been established for blacks in 1901. Acts of 1928, No. 161. In 1928, the school was renamed the Louisiana Negro Normal and Industrial school, and later the name was changed to Grambling College.

E. McNeese State University at Lake Charles, Louisiana was established as the John McNeese Junior College and in 1950 the school was under the con-

trol of the Louisiana State Board of Supervisors as "a school of higher education in the arts and sciences for the education of white children of the State of Louisiana." Acts of 1950, No. 69.

F. Nicholls State University at Thibodaux, Louisiana, was established as the Thibodaux Trades School in 1938 "for the education of white people of the State of Louisiana." Acts of 1938, No. 309.

G. Northeast Louisiana University at Monroe, Louisiana was established in 1940 as a branch of Louisiana State University and Agricultural and Mechanical College, and in 1950 was designated as "a school of higher education in the arts and sciences for white children of the State of Louisiana." Acts of 1950, No. 527.

H. Northwestern Louisiana University at Natchitoches, Louisiana, was established in 1892 as the Louisiana State Normal College, and was designated as a school "to train teachers for the public schools of Louisiana, and shall be open to white persons." Acts of 1892, No. 73.

I. Southeastern Louisiana University at Hammond, Louisiana, was established in 1928 as Southern Louisiana College "a school for higher education in the arts and sciences for the white children of the State of Louisiana." Acts of 1928, No. 136.

J. University of Southwestern Louisiana at Lafayette, Louisiana, was established in 1898 as the Southwestern Louisiana Industrial Institute, as a school "for the education of white children of the State of Louisiana in the arts and sciences." Acts of 1898, No. 162.

21. Prior to 1953, defendant State of Louisiana and its agents had established a dual system of public higher education based upon race as evidenced by its admis-

sions practices, faculty hiring and assignment, facilities and curricula.

22. Since 1953 the defendant State of Louisiana and its agents have maintained and perpetuated the dual system of public higher education based upon race and have expanded it by constructing parallel facilities in close proximity to each other in the same cities.

A. Louisiana State University at New Orleans, Louisiana, was established in 1956. Acts of 1956, No. 60.

B. Southern University at New Orleans, Louisiana, was established in 1956. Acts of 1956, Ex. Sess. 50.

C. Louisiana State University at Shreveport, Louisiana, was established in 1964. Acts of 1964, No. 41.

D. Southern University at Shreveport, Louisiana, was established in 1964. Acts of 1964, No. 141.

23. As late as 1964, in an official State publication listing schools, the State of Louisiana identified its colleges and universities as "white" or "negro":

A. *Institutions of Higher Learning—White*

Louisiana State University
Louisiana State University in New Orleans
Louisiana State University at Alexandria
Louisiana State University Medical Center
Louisiana Polytechnic Institute
McNeese State College
Nicholls State College
Northeast Louisiana State College
Northwestern State College of Louisiana
Southeastern Louisiana College
University of Southwestern Louisiana

B. *Institutions of Higher Learning—Negro*

Southern University and A & M College
Southern University Branch in New Orleans
Grambling College

24. Pursuant to State law, defendant Louisiana Coordinating Council for Higher Education has developed, proposed and submitted to State Officials a report entitled *Master Plan Toward Balanced Growth in Louisiana Posthigh School Education: Quantity and Quality*, which would maintain and perpetuate the dual system of public higher education based upon race which exists within the State of Louisiana.

The acts and practices of the defendants and their agents maintain and perpetuate an unlawful dual system of higher education based upon race, and thereby deprive black students attending State supported schools, and prospective black students, of equal protection of the laws and equal educational opportunities in violation of the Fourteenth Amendment to the Constitution of the United States and in violation of Title VI of the Civil Rights Act of 1964 and the regulations issued pursuant thereto.

26. Defendants and their agents have failed in their affirmative duty to provide specific measures and timetables to eliminate the vestiges of the dual system.

27. As one result of defendants' policies, student bodies and faculties in the Louisiana system of public higher education remain largely segregated, as shown by the statistics in Attachments A and B to this Complaint.

WHEREFORE, the United States prays that this Court enter an order enjoining the defendants, their agents, officers, employees, successors, and all persons in active concert with them from maintaining and perpetuating racial dualism in the State supported system of higher education within the State of Louisiana. The

United States prays that defendants be required to develop, submit and implement detailed plans which promise realistically and promptly to eliminate all vestiges of a dual system of higher education existing within the State of Louisiana, pursuant to the requirements of Title VI of the Civil Rights Act of 1964 and in compliance with the Fourteenth Amendment to the United States Constitution.

The United States further prays that this Court grant such additional relief as the needs of justice may require.

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ATTACHMENT A

	Approximate 1972-73 Student Enrollment		
	Black	Total	% Black
1. Louisiana State University (below)	2,160	28,146	7.7
Baton Rouge Campus	1,176	17,688	6.6
New Orleans Campus	953	9,351	10.2
Shreveport Campus	31	1,107	2.8
Eunice Campus	13	404	3.2
Alexandria Campus	63	842	7.1
2. Southern University (below)	9,881	9,955	99.3
Baton Rouge Campus	6,924	6,992	99.0
New Orleans Campus	2,205	2,210	99.8
Shreveport Campus	752	753	99.9
3. Louisiana Tech. University	484	7,759	6.2
4. Grambling College	3,615	3,646	99.1
5. McNeese State College	384	4,559	8.4
6. Nicholls State University	242	4,404	5.5
7. Northeast Louisiana University	621	6,669	9.3
8. Northwestern Louisiana University	437	4,279	10.2
9. Southeastern Louisiana University	193	4,641	4.2
10. University of Southwestern Louisiana	729	8,828	8.3

ATTACHMENT B

	Approximate 1972-73 Faculty Statistics		
	Black	Total	% Black
1. Louisiana State University	26	1610	1.6
Baton Rouge Campus	14	1049	1.3
New Orleans Campus	12	474	2.5
Shreveport Campus	0	87	0.0
2. Southern University	424	544	87.2
Baton Rouge Campus	312	400	78.0
New Orleans Campus	41	42	98.8
Shreveport Campus	71	102	69.6
3. Louisiana Tech. University	0	347	0.0
4. Grambling College	203	261	77.7
5. McNeese State University	1	197	.5
6. Nicholls State University	4	191	2.1
7. Northeast Louisiana University	5	291	1.7
8. Northwestern Louisiana University	4	254	1.6
9. Southeastern Louisiana University	2	323	.7
10. University of Southwestern Louisiana	16	500	3.2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300-A

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA: LOUISIANA BOARD OF REGENTS: WILLIAM ARCENEAUX, as Commissioner of Higher Education, ROBERT J. BODET, RICHARD D'AQUIN, W. J. DEFELICE, ALBERT DENT, EWELL EAGAN, J.K. HAYNES, PARLETTA HOLMES, THOMAS JAMES, MRS. CLAUDE KIRKPATRICK, GEORGE LUFFEY, CHARLES MILAM, JUDGE R. M. PRESTRIDGE, ROBERT PUGH, JOE SMITH, JR., JOHN THISTLETHWAITE, Members of the Board of Regents; LOUISIANA BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES: WILLIAM J. JUNKIN, JR., as Executive Director of the Board of Trustees, ELEANOR H. BROWN, WILLIAM C. BROADHURST, DEWEY H. CARRIER, JR., JAMES E. DAVIDSON, JOSEPH T. DAVIES, JR., F. L. EAGAN, JR., GORDON FLORY, HERBERT M. GORDON, EUGENE G. GOUAUX, MRS. DAWSON JOHNS, J. CURTIS JOUBERT, CARRIE MCHENRY, CHARLES M. MILLER, SR., JUNE P. MOORE, ENOCH T. NIX, HARVEY PELTIER, JR., N. J. STAFFORD, JR., Members of the Board of Trustees for State Colleges and Universities; BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE: JOHN SHERROUSE JR., JAMES R. PELTIER, SHELDON D. BEYCHOK, WILLIAM T. BROWN, CHARLES V. CUSIMANO, NORRIS V. FITZMORRIS, MURPHY J. FOSTER, CAMILLE F. GRAVEL, JR., WILLIAM T. HANNA, JR., WILLIE E. HAUSEY, A. EGLIN MCKEITHEN, J. J. MCKERNAN, RUTH L. MILLER, TOMMY NECK, WILLIAM S.

PECK, JR., GORDON E. DORE, OLIVER STOCKWELL, KEITH WHITEHEAD, Members of the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College; BOARD OF SUPERVISORS FOR SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE: LIONEL JOHNSON, SR., MARIE MITCHELL CARTER, BRADY L. BLADE, WALTER C. DUMAS, PEARLIE HARDIN ELLOIE, BOOKER D. HARRISON, ROBERT LEE JONES, RUSSELL MANUEL, ROSCOE J. MOORE ERNEST NABERS, WILLIAM PANTER, GERALD T. PELTIER, CECIL G. TAYLOR, DONALD VERRET, TIMOTHY G. WADE, BETTY L. WASHINGTON, RAY OLIVER WRIGHT, Members of the Board of Supervisors of Southern University and Agricultural and Mechanical College; LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION: J. LOUIS WATKINS, MARIE LOUISE SNELLINGS, JESSE H. BANKSTON, CHARLES A. CASTILLE, JR., F. A. "RED" DAVIS, FELICIAN FOURRIER, GEORGIA WHITE-HULBERT, CLAIRE LANDRY, HELEN REEDS, A. J. "SOOKIE" ROY, Members of the State Board of Elementary and Secondary Education, ST. BERNARD PARISH SCHOOL BOARD: JOHN R. LANE, AUGUST ROBIN, ALBERT AUENEL, GEORGE BOORS, MARTIN CAMPO, FLOYD LANDRY, ARTHUR LIUZZA, ROBERT J. MICHEL, HILLARY NUNEZ, LEON PERNICARRO, KENNETH RAVALAIS, Members of the St. Bernard Parish School Board; BOSSIER PARISH SCHOOL BOARD: G. C. ADKINS, ROBERT H. MOSELEY S. H. JOHNSTON, J. M. DURAM, JACK CLAYTON, PRESTON CROWNOVER, RANDAL LEFTER, DAVID MONTGOMERY, RUTH SULLIVAN, HARLAN NORTON, BARBARA GRAY and J. W. CAMERON, Members of the Bossier Parish School Board; J. KELLY NIX, State Superintendent of Public Education; BUFORD F. JONES, Superintendent of Schools for St. Bernard Parish; JOHN MCCONATHY, Superintendent of Schools, for Bossier Parish;

Defendants.

AMENDED COMPLAINT

[Filed Nov. 12, 1980]

The United States of America alleges that:

1. This action is brought by the Attorney General on behalf of the United States pursuant to Sections 601 and 602 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, 2000d-1, and the Fourteenth Amendment to the Constitution of the United States.

2. This Court has jurisdiction of this action under Sections 601 and 602 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, 2000d-1, and under 28 U.S.C. 1345.

3. The defendant State of Louisiana is a State of the United States.

4. The defendant Louisiana Board of Regents is the agency under the laws of the State of Louisiana which is responsible for the coordination and planning of public higher education in the State of Louisiana. The Board of Regents meets, and maintains its records, in Baton Rouge, Louisiana.

5. Defendant William Arceneaux is Commissioner of Higher Education, and is chief administrative officer of the Board of Regents. The members of the Louisiana Board of Regents are Robert J. Bodet, Richard D'Aquin, W. J. DeFelice, Albert Dent, Ewell Eagan, J. K. Haynes, Parletta Holmes, Thomas James, Mrs. Claude Kirkpatrick, George Loffey, Charles Milam, Judge R. M. Prestridge, Robert Pugh, Joe Smith, Jr., and John Thistlethwaite. Each member resides within the State of Louisiana.

6. The defendant Louisiana Board of Trustees for State Colleges and Universities is the agency under the laws of the State of Louisiana which operates, governs and administers all State colleges and universities not managed by the Louisiana State University or Southern University Boards of Supervisors.

7. Defendant William J. Junkin, Jr. is Executive Director of the Board of Trustees for State Colleges and Universities and is chief administrative officer of the Board of Trustees. The members of the Board of Trustees for State Colleges and Universities are Eleanor H. Brown, William C. Broadhurst, Dewey H. Carrier, Jr., James E. Davidson, Joseph J. Davies, Jr., F. L. Eagen, Jr., Gordon Flory, Herbert M. Gordon, Eugene G. Gouaux, Mrs. Dawson Johns, J. Curtis Joubert, Carrie McHenry, Charles M. Miller, Sr., June P. Moore, Enoch T. Nix, Harvey Peltier, Jr., and N. J. Stafford, J.. Each member resides within the state of Louisiana.

8. The defendant Board of Supervisors of Louisiana State University and Agricultural and Mechanical College is the agency under the laws of the State of Louisiana which operates, governs, and administers all state colleges under the Louisiana State University System. Its principal office is in Baton Rouge, Louisiana.

9. The members of the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College are John Sherrouse, Jr., James R. Peltier, Sheldon D. Beychok, William T. Brown, Charles V. Cusimano, Norris V. Fitzmorris, Murphy J. Foster, Camile F. Gravel, Jr., William T. Hanna, Jr., Willie E. Hausey, Eglin McKeithen, J. J. McKernan, Ruth Miller, Tommy Neck, William S. Peck, Jr., Gordon E. Dore, Oliver Stockwell and Keith Whitehead. Each member resides within the State of Louisiana.

10. The defendant Board of Supervisors of Southern University and Agricultural and Mechanical College is the agency under the laws of State of Louisiana which operates, governs and administers all state colleges under the Southern University System.

11. The members of the Board of Supervisors of the Southern University and Agricultural and Mechanical College are Lionel Johnson, Marie Mitchell Carter, Brady

L. Blade, Walter C. Dumas, Pearlie Hardin Elloie, Booker D. Harrison, Robert Lee Jones, Russell Manuel, Roscoe J. Moore, Ernest Nabers, William Panter, Gerald T. Peltier, Cecil G. Taylor, Donald Verret, Timothy Wade, Betty L. Washington, and Ray Oliver Wright.

12. The defendant State Board of Elementary and Secondary Education is the agency of the State of Louisiana that supervises and controls the public elementary and secondary schools, post-secondary vocational-technical schools and special schools under its jurisdiction. The Board has general control and authority over the St. Bernard and Bossier Parish School Boards.

13. The members of the State Board of Elementary and Secondary Education are J. Louis Watkins, Marie Louise Snellings, Jesse H. Bankston, Charles A. Castille, Jr., F. A. "Red" Davis, Felician Fourrier, Georgia White-Hulbert, Claire Landry, Helen Reeds and A. J. "Sookie" Roy.

14. The defendant St. Bernard Parish School Board is a school board organized and existing under the laws of the State of Louisiana. It employs, and establishes salaries for, faculty and administrative staff at St. Bernard Parish Community College.

15. The members of the St. Bernard Parish School Board are John R. Lane, August Robin, Albert Auenel, George Boors, Martin Campo, Floyd Landry, Arthur Liuzza, Robert J. Michel, Hillary Nunez, Leon Pernicarro and Kenneth Ravalais.

16. The defendant Bossier Parish School Board is a school board organized and existing under the laws of the State of Louisiana. It employs, and establishes salaries for, faculty and administrative staff at Bossier Parish Community College.

17. The members of Bossier Parish School Board are G. C. Adkins, Robert Moseley, S. H. Johnston, J. M.

Durham, Jack Clayton, Preston Crownover, Randal Lefter, David Montgomery, Ruth Sullivan, Harlan Norton, Barbara Gray and J. W. Cameron.

18. Defendant J. Kelly Nix is State Superintendent of Public Education and is the administrative head of the Department of Education, responsible for implementing the policies of the State Board of Elementary and Secondary Education.

19. Defendants Buford F. Jones and John McConathy are the chief administrative officers of the St. Bernard and Bossier Parish school systems, respectively.

20. The defendants named in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 have the collective responsibility under Louisiana law of operating the Louisiana statewide system of public higher education.

21. Publicly financed higher education in Louisiana is paid for primarily with State and Federal funds. Defendants and their agents, at all times material, have been receiving and continue to receive, Federal financial assistance for their State supported institutions of higher education.

22. Defendants, by their agents or predecessors, in consideration for federal financial assistance, have agreed to comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*) and with all requirements imposed by or pursuant to the regulations of the Department of Education (formerly the Department of Health, Education and Welfare) (45 C.F.R. Part 80) issued pursuant to that Title.

23. Title VI of the Civil Rights Act of 1964, and the regulations issued to effectuate the provisions of Title VI (45 C.F.R. Part 80), provide that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving

Federal financial assistance from the Department of Education. The regulations provide that all programs and facilities must be conducted or operated in compliance with all requirements imposed by or pursuant to Title VI. The regulations further provide that, upon determination by the Department of Education that a recipient of Federal funds is in noncompliance with Title VI or the regulations issued pursuant to Title VI, the United States has the right to seek judicial enforcement of Title VI of the Civil Rights Act of 1964.

24. On January 13, 1969, October 21, 1969, May 21, 1973, and November 10, 1973, authorized representatives of the Department of Health, Education and Welfare sent letters to the appropriate agents of the defendant State of Louisiana advising that the State of Louisiana operates a racially dual system of public higher education in violation of Title VI of the Civil Rights Act of 1964. The letters requested a statewide higher education desegregation plan, and the November 10, 1973 letter stated that:

> if by November 30, 1973, I have not received a satisfactory commitment to comply with Title VI, as set forth at the beginning of this letter, I will have no alternative but to initiate enforcement action to secure compliance with Title VI by Louisiana's Systems of Higher Education.

25. The defendants herein have taken the position that the Louisiana system of public higher education complies with Title VI and the Fourteenth Amendment to the Constitution.

26. The defendants herein have failed and refused to submit a constitutionally acceptable plan to disestablish the racially dual system of public higher education in the State of Louisiana.

27. Because the defendant State of Louisiana and its agents failed to submit a constitutionally acceptable plan to disestablish the dual system of higher education exist-

ing within Louisiana, on January 11, 1974, the General Counsel of the Department of Health, Education and Welfare, pursuant to Section 602 of Title VI, 42 U.S.C. 2000d-1, and 45 C.F.R. 80.8(a) and (d), wrote to the Assistant Attorney General for Civil Rights of the United States Department of Justice, and recommended that appropriate judicial proceedings be brought to enforce the rights of the United States.

28. Acting pursuant to Louisiana law and usage, defendants and their agents have established and perpetuated dualism based upon race in the operation of state institutions of higher education by constructing and maintaining institutions of higher learning designed to serve students of a particular race.

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C. Louisiana Polytechnic Institute at Ruston, Louisiana in Lincoln Parish was established 1864 as an institution for "whites". Acts of 1894, No. 68.

D. In 1928, the State of Louisiana took over control of the Lincoln Parish Training School at Grambling, Louisiana, which had been established for blacks in 1901. Acts of 1928, No. 161. In 1928, the School was renamed the Louisiana Negro Normal and Industrial School, and later the name was changed to Grambling College.

E. McNeese State University at Lake Charles, Louisiana was established as the John McNeese Junior

College and in 1950 the school was placed under the control of the Louisiana State Board of as "a school of higher education in the arts and sciences for the education of white children of the State of Louisiana." Acts of 1950, No. 69.

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J. University of Southwestern Louisiana at Lafayette, Louisiana, was established in 1898 as the Southwestern Louisiana Industrial Institute, as a school "for the education of white children of the State of Louisiana, in the arts and sciences." Acts of 1898; No. 162.

29. Prior to 1953, defendant State of Louisiana and its agents had established a dual system of public higher

education based upon race as evidenced by its admissions practices, faculty hiring and assignment, facilities and curricula.

30. Since 1953, the defendant State of Louisiana and its agents have maintained and perpetuated the dual system of public higher education based upon race and have expanded it by constructing parallel facilities in close proximity to each other in the same cities.

A. Louisiana State University at New Orleans, Louisiana, was established in 1956. Acts of 1956, No. 60.

B. Southern University at New Orleans, Louisiana, was established in 1956. Acts of 1956, Ex. Sess. 28.

C. Louisiana State University at Shreveport, Louisiana, was established in 1964. Acts of 1964, No. 41.

D. Southern University at Shreveport, Louisiana was established in 1964. Acts of 1964, No. 42.

31. As late as 1964, in an official State publication listing schools, the State of Louisiana identified its colleges and universities as "white" or "negro":

A. *Institutions of Higher Learning-White*

Louisiana State University
Louisiana State University in New Orleans
Louisiana State University at Alexandria
Louisiana State University Medical Center
Louisiana Polytechnic Institute
McNeese State College
Nicholls State College
Northeast Louisiana State College
Northwestern State College of Louisiana
Southeastern Louisiana College
University of Southwestern Louisiana

B. *Institutions of Higher Learning-Negro*

Southern University and A&M College
Southern University Branch in New Orleans
Grambling College

32. In 1966, the Louisiana Legislature authorized the State Board of Education to establish pilot programs with two high schools for the purpose of offering accredited courses at the junior college level. In 1967 and 1968, the State Board of Education approved the establishment of thirteenth and fourteenth year pilot programs in St. Bernard and Bossier Parishes. The St. Bernard Parish School Board and the Bossier Parish School Board, by resolution, designated the thirteenth and fourteenth grade programs in their parishes as St. Bernard Parish Community College and the Bossier Parish Community College, respectively. In 1976, the Louisiana Legislature recognized St. Bernard Parish Community College and Bossier Parish Community College as postsecondary institutions and authorized them to award associate degrees and certificates. 1976 La. Acts No. 523. The operation of these predominantly white community colleges within the same service area as traditionally black institutions of higher education perpetuates the dual system of higher education.

33. Pursuant to State law, defendant Louisiana Board of Regents has developed, and proceeded to implement, a document entitled *The Master Plan For Higher Education in Louisiana*, which would maintain and perpetuate the dual system of public higher education based upon race which exists within the State of Louisiana.

34. The acts and practices of the defendants and their agents maintain and perpetuate an unlawful dual system of higher education based upon race, and thereby deprive black students attending State supported schools, and prospective black students, of equal protection of the laws and equal educational opportunities in violation of

the Fourteenth Amendment to the Constitution of the United States and in violation of Title VI of the Civil Rights Act of 1964 and the regulations issued pursuant thereto.

35. Defendants and their agents have failed in their affirmative duty to provide specific measures and timetables to eliminate the vestiges of the dual system.

36. As one result of defendants' policies, student bodies, faculties and administrative staffs in the Louisiana system of public higher education remain largely segregated, as shown by the statistics in Attachment A to this Amended Complaint.

WHEREFORE, the United States prays that this Court enter an order enjoining the defendants, their agents, officers, employees, successors, and all persons in active concert with them, from maintaining and perpetuating racial dualism in the State supported system of higher education within the State of Louisiana. The United States prays that defendants be required to develop, submit and implement detailed plans which promise realistically and promptly to eliminate all vestiges of a dual system of higher education existing within the State of Louisiana, pursuant to the requirements of Title VI of the Civil Rights Act of 1964 and in compliance with the Fourteenth Amendment to the United States Constitution.

The United States further prays that this Court grant such additional relief as the needs of justice may require.

Respectfully submitted,

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NATHANIEL DOUGLAS

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ATTACHMENT A

TRADITIONALLY BLACK INSTITUTIONS:

	% Black Total Headcount Enrollment	% Black Full-Time Faculty	% Black Administrators
Grambling	97.7	82.0	98.0
SUBR	92.5	83.8	98.1
SUNO	99.9	67.0	100.0
SUS-BC	99.9	93.3	100.0

TRADITIONALLY WHITE INSTITUTIONS:

	% White Total Headcount Enrollment	% White Full-Time Faculty	% White Administrators
L.S.U. Alexandria	89.7	100.0	100.0
L.S.U. Baton Rouge	95.4	97.6	96.9
L.S.U. Eunice	89.7	97.7	91.7
L.S.U. Shreveport	93.9	99.1	100.0
U.N.O.	83.5	97.4	96.7
La. Tech	91.2	99.2	100.0
McNeese	86.6	99.2	97.9
Nicholls	86.5	97.4	100.0
Northeast	81.0	97.9	94.1
Northwestern	83.1	99.6	100.0
Southeastern	89.4	98.4	100.0
U.S.L.	83.8	98.8	95.2
L.S.U. Law Center	98.2	97.7	100.0
L.S.U. Med. Center	96.8	98.3	98.1

TRADITIONALLY WHITE COMMUNITY COLLEGES:

	% White Total Headcount Enrollment
Delgado Community College	51.1
Bossier Parish Community College	88.6
St. Bernard Parish Community College	90.0

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 1980, I served a true and correct copy of the foregoing Amended Complaint on the following counsel of record by placing a copy of same in the United States Mail, postage prepaid:

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ARTICLE VIII. EDUCATION

Sec.

Preamble.

1. Public Educational System.
2. State Superintendent of Education.
3. State Board of Elementary and Secondary Education.
4. Approval of Private Schools.
5. Board of Regents.
6. Board of Trustees for State Colleges and Universities.
7. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College; Board of Supervisors of Southern University and Agricultural and Mechanical College.
8. Boards; Membership; Compensation.
9. Parish School Boards; Parish Superintendents.
10. Existing Boards and Systems Recognized; Consolidation.
11. Appropriations; State Boards.
12. Appropriations; Higher Education.
13. Funding; Apportionment.
14. Tulane University.

Preamble

The goal of the public educational system is to provide learning environments and experiences, at all stages of human development, that are humane, just, and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop to his full potential.

§ 1. Public Educational System

Section 1. The legislature shall provide for the education of the people of the state and shall establish and maintain a public educational system.

§ 2. State Superintendent of Education

Section 2. There shall be a superintendent of education for public elementary and secondary education who, subject to provisions for appointment in lieu of election set forth in Article IV, Section 20, of this constitution, shall be elected for a term of four years. If the office is made appointive, the State Board of Elementary and Secondary Education shall make the appointment. He shall be the administrative head of the Department of Education and shall implement the policies of the State Board of Elementary and Secondary Education and the laws affecting schools under its jurisdiction. * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

Civil Action No. 74-68

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

REQUEST FOR A THREE-JUDGE COURT

Plaintiff, United States of America, requests this Court to notify the Chief Judge of the Court of Appeals for the Fifth Judicial Circuit, pursuant to 28 U.S.C. § 2284, 28 U.S.C. § 2281, and Rule 12 of this Court that the Complaint filed by the government in the above captioned case, and the application of the government contained in this request, requires that a three-judge district court be convened in the above captioned case

As grounds for this action, the Court is respectfully referred to the Memorandum in Support of the Request for a Three-Judge Court filed herewith.

Respectfully submitted,

DOUGLAS M. GONZALES
United States Attorney

J. STANLEY POTTINGER
Assistant Attorney General

/s/ John H. Newman
BRIAN K. LANDSBERG
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Washington, D.C. 20530

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

Civil Action No. ————

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

MEMORANDUM IN SUPPORT OF THE REQUEST FOR A THREE-JUDGE COURT

In light of the recent unanimous decision of the Court of Appeals for the Fifth Judicial Circuit in the consolidated cases known collectively as *Sands* v. *Wainwright*, —— F 2d —— (5th Cir., 1973),[1] and having given the required notice under Local Rule 12[2] this Court is re-

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[1] *Sands* v. *Wainright* —— F.2d —— (5 Cir., 1973) is found in a slip opinion dated December 26, 1973. Page numbers cited in this memorandum refer to that slip opinion, and are referred generally as "*Sands, supra.*" Individual cases combined within *Sands, supra,* include: *Sands* v. *Wainright* No. 73-1192; *Baker, et al.* v. *Estelle* No. 72-2471; *Guajardo, et al.,* v. *Estelle* No. 72-3331; and, *Guajardo* v. *McAdams* No. 73-1497.

[2] Rule 12. *Three-Judge Cases.*

When any suit or proceeding which is thought to require a three-judge court for its disposition is commenced, the party instituting the action shall give notice to the Clerk in writing under what provision he is proceeding and that a three-judge court is requested. In the absence of such notice the Clerk may treat the matter as one not requiring three-judges. In cases in which such notice is filed all pleadings shall be filled in quadriplicate until it is determined that the matter is not one for three judges.

quired pursuant to 28 U.S.C. § 2281[3] and 28 U.S.C. § 2234[4] to notify the Chief Judge of the Court of Appeals for the Fifth Judicial Circuit whenever a Request for a Three-Judge Court is filed with the district court along with a Complaint which (1) seeks injunctive relief, (2) raises a substantial constitutional question, (3) challenges a statewide statute, policy, practice or regulation as applied and further seeks relief which (4) may require changes throughout the State system of higher education. In this regard, this Court is respectfully referred to the Complaint filed by the United States attached hereto.[5]

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[3] § 2281 *Injunction against enforcement of State statute; three-judge court required.*

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

[4] § 2284 *Three-judge district court; composition procedure.*

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

[5] The Complaint filed by the United States, plaintiff in the above captioned case, is an action to insure that the operation of the statewide system of public higher education throughout the State of Louisiana [hereinafter State] complies with the requirements of Title VI of the Civil Rights Act of 1964, the regulations of the Department of Health, Education and Welfare issued pursuant to

The first element which is required in order to convene a three-judge court is that a complaint must seek injunctive relief on the ground that a State statute, policy, practice or regulation is unconstitutional. *Swift* v. *Wickham*, 382 U.S. 111 (1965); *Sands*, *supra*, p. 8. In this regard, the government's Complaint states that:

> "the United States prays that this Court enter an order enjoining the defendants, their agents, officers, employees, successors, and all persons in active concert with them from maintaining and perpetuating racial dualism in the State supported system of higher education within the State of Louisiana." [6]

Consequently, the Complaint seeks the necessary injunctive relief required to convene a three-judge court.

A second element which is required in order to convene a three-judge court, is that the Complaint must raise a substantial constitutional question. *Rorick* v. *Board of Commissioners*, 307 U.S. 208 (1939); *Swift*, *supra*; *Moody* v. *Flowers*, 387 U.S. 97 (1967); *Board of Regents of the University of Texas* v. *New Left Education*

Title VI, and the Fourteenth Amendment to the United States Constitution. As outlined in paragraphs three through eleven of the Complaint, the State of Louisiana and its agents exercise the collective repsonsibility under Louisiana law for the control, supervision and operation of all institutions of higher education within the State. In this capacity, the defendants and their agents have proposed and implemented policies, practices and regulations pursuant to their statutory authority which have maintained and perpetuated an unlawful statewide dual system of public higher education on the basis of race. The government seeks injunctive relief against the defendants, their agents, officers, employees, successors and all persons in active concert with them from maintaining and perpetuating racial dualism in the State supported system of higher education throughout the State of Louisiana. Additionally, the United States prays that the defendants be ordered to devise and implement a plan to remedy the unlawful perpetuation of the dual system.

[6] Complaint page 13.

Project, 404 U.S. 541 (1971); *Sands*, *supra*, pp. 10-11. The government's Complaint states that:

> "The acts and practices of the defendants and their agents maintain and perpetuate an unlawful dual system of higher education based upon race, and thereby deprive black students from attending state supported schools, and prospective black students, of equal protection of the laws and equal educational opportunities in violation of the Fourteenth Amendment to the Constitution of the United States. . . ."[7]

In this regard the suit filed by the United States is the first case filed in this judicial circuit which challenges the operation of the statewide system of higher education as being racially discriminatory. As a result, the Complaint of the government raises a substantial constitutional question. *Ex parte Poresky*, 290 U.S. 30 (1933); *Bailey* v. *Patterson*, 369 U.S. 31 (1962); *Goosby* v. *Osser*, 409 U.S. 512 (1973).

A third element which is required in order to convene a three-judge court, is that the Complaint must challenge the constitutionality of a state statute, policy or regulation which has statewide application rather than merely local effect *Moody*, *supra*; *Rorick*, *supra*. As the Supreme Court has stated,

> "Such a court is required where the challenged statute or regulation, albeit created or authorized by the state legislature, has statewide application or effectuates a statewide policy But a single judge, not a three-judge court, must hear the case where the statute or regulation is of only local import. . . . Thus, the "term 'statute' in § 2281 does not encompass local ordinances or resolutions," . . . nor does it in-

[7] Complaint, pages 12-13.

> clude a state statute having only local impact, even if administered by a state official."

Board of Regents, supra, at 542-543. Moreover, in *Board of Regents, supra*, the Supreme Court believed that a three-year court was inappropriate where the petitioners claimed that a regulation promulgated by the Board of Regents of the University of Texas regarding a campus newspaper had statewide application and therefore required a three-judge court.

> "The Regents' rulemaking power and the rules at issue in this litigation extend to but a fraction of the campuses in the Texas system of higher public education. These rules can scarcely be described as matters of statewide concern or expressions of a statewide policy when a large percentage of Texas colleges and universities are unaffected by them and could not be affected by any pronouncement that a federal court might make on their constitutionality. There is no suggestion or indication of any kind that the Regents' rules are similar for other schools or are required by or express statewide policy."

Board of Regents, supra, at p. 544. By comparison, the Complaint filed in the instant case states that the named defendants have "the collective responsibility under Louisiana law of operating the Louisiana statewide system of public higher education," [8] and consequently a three-judge court is required.

Further analysis of *Board of Regents, supra*, demonstrates that the Supreme Court believed that a stricter standard would apply where a statewide policy involved an action which "although having a local impact, [was].

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[8] Complaint, page 5. See, Article XII, §§ 4 and 7 of the Constitution of State of Louisiana; Acts 1968, No. 213; Acts 1972, No. 712. R.S. 17 *et seq.*

. . . expressive of an official, statewide policy to maintain a racially identifiable, dual system of education" *Board of Regents, supra,* p. 544 Note 2. *Sigma Chi Fraternity* v. *Regents of the University of Colorado,* 258 F.Supp. 515 (D. Colo., 1966). Moreover, as the majority pointed out in *Board of Regents, supra,* 28 U.S.C. § 2281 has been invoked to challenge a statewide statute which manifested a state policy prohibiting admission of black graduate students, *McLaurin* v. *Oklahoma State Regents,* 339 U.S. 637 (1950), but these facts did not exist in the University of Texas case, because "nothing in the record before us in this case indicates that the regulations challenged here represent state policy, reflect a statutory command, or apply to more than a fraction of the Texas higher educational institutions." *Board of Regents, supra,* pp. 544-545, Note 2. It is significant, therefore, that the Government's Complaint attacks the statewide policies and practices of the State of Louisiana. The Complaint alleges that,

> "Acting pursuant to Louisiana law and usage defendants and their agents have established and perpetuated dualism based upon race in the operation of state institutions of higher education by constructing and maintaining institutions of higher learning designed to serve students of a particular race." [9]

The Complaint further states that,

> "Since 1953, the defendant State of Louisiana and its agents have maintained and perpetuated the dual system of public higher education based upon race and have expanded it by constructing parallel facilities in close proximity to each other in the same cities." [10]

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[9] Complaint, page 8.

[10] Complaint, page 11.

Additionally, the Complaint states that,

> "The acts and practices of the defendants and their agents maintain and perpetuate an unlawful dual system of higher education based upon race, and thereby deprive black students attending State supported schools, and prospective black students, of equal protection of the laws and equal educational opportunities. . . ." [11]

Unlike the University of Texas case, therefore, the government's Complaint names defendants and agents of the defendants who have the responsibility for the control, operation and supervision of the entire statewide system of public higher education within the State of Louisiana.

Recently, the Court of Appeals for the Fifth Judicial Circuit, sitting *en banc*, reviewed the status of 28 U.S.C. § 2281 jurisprudence,[12] in *Sands, supra.* Before the Fifth Circuit were several combined cases which sought to challenge the constitutionality of various policies, practices and regulations of state prison officials which, although admittedly promulgated pursuant to a valid state statute, allegedly had an unconstitutional effect when applied throughout the state prison system of Texas. Briefly, the Court of Appeals concluded that even though a state statute may be valid on its face, if agents of the State establish statewide policies, practices or regulations pursuant to their statutory authority which are

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[11] Complaint, pages 12-13.

[12] Although the Supreme Court has stated that § 2281 should be narrowly construed, *Phillips* v. *United States*, 312 U.S. 246 (1941), *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), a great deal of confusion has surrounded § 2281 litigation. See, Comment, *The Three-Judge District Court; Scope and Procedure Under Section 2281*, 77 Harv. L. Rev. 299 (1963); Comment, *The Three-Judge Court Reassessed: Changing Roles in Federal State Relations*, 72 Yale L. J. 1646 (1963). Currie, *The Three Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. (1964); Comment, *Reviewing the Grant of a Three-Judge Court*, 69 Colum. L. Rev. 146 (1969).

unconstitutional when applied, then a petitioner is entitled to have a three-judge court consider the constitutionality of the State's actions. First, at issue in the case of *Sands* v. *Wainright*, No. 73-1192, was a general state statute which granted administrative disciplinary authority to state prison officials,[13] and a subsequent regulation which had been promulgated pursuant to that state statute. The Court of Appeals reviewed the district court record below and stated that,

> "[a]lthough the court would not have had to declare the statute or regulations unconstitutional on their face in order to grant the relief requested by Sands, it would have had to declare the regulation unconstitutional as applied and to enjoin their further enforcement unless additional procedural safeguards were provided."

Sands, supra, at p. 19. When the district court issued, in effect, an injunction against the statewide prison regulations, the Court of Appeals stated that, "we are forced to conclude that the single district judge has granted exactly the kind of relief § 2281 has proclaimed must be 'determined by a district court of three judges.'" *Sands, supra*, at p. 20.

The second combined case in *Sands, supra, was Baker, et al.* v. *Estelle*, No. 72-2471, which was a class action brought by state prisoners "affected by the policies, practices, or acts of Texas prison officials," *Sands, supra*, at p. 22. Specifically, the petitioners challenged the admin-

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[13] Florida Statute § 945.21 *Regulations of the Division.*

(1) The division is authorized to adopt and promulgate regulations governing the administration of the correctional system and the operation of the division. In addition, to specific subjects otherwise provided herein, regulations of the division may relate to:

(a) Conduct to be observed by prisoners;

(b) Punishment of prisoners;

istrative procedures established by prison officials regarding solitary confinement and censorship of attorney-inmate correspondence. Despite the validity of the state statute granting authority to prison officials, the Court of Appeals noted that,

> "If the relief sought had been granted, the Texas Department of Corrections would have been compelled to alter substantially its entire method of operation as regards prison disciplinary proceedings."

Sands, supra, at p. 23. The general state statute delegating disciplinary authority to prison officials had been interpreted by the prison officials as authorizing limited due process in an administrative hearing, and although the statute was not invalid on its face, the practice of the prison officials was alleged to be unlawful as applied. Prison officials therefore, argued that petitioner's complaint did not seek to enjoin the enforcement of any State statute or regulation but only prison "practices," and thus a three-judge court was not required. To this the Court of Appeals responded that,

> "Plaintiffs' attempted distinction between "practices" and "regulations" cannot be sustained; in this case, it is a distinction without a difference. No party has contended that Texas prison officials are acting outside the scope of their statutory authority in carrying on these alleged unconstitutional practices. The "practices" whose enforcement the inmates seek to enjoin are, in reality, the Rules and Regulations of the Texas Department of Corrections, as *applied*." [14] (emphasis in the original).

It is significant therefore, that in the Complaint filed by the government in the instant case, the United States seeks relief, similar to that sought be the petitioner in

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[14] *Sands, supra*, slip opinion December 26, 1973, at page 24.

Baker, supra, which will enjoin the practices of the State of Louisiana as applied and interpreted by the defendants and their agents. In *Baker, supra,* the Court of Appeals concluded that not only would new regulations be required to cure the constitutional infirmity, but that the present practices would also have to be modified or enjoined. Specifically,

> "If a [single judge] federal court were to uphold the constitutional arguments by plaintiffs' counsel throughout this litigation, that court would have to insist that new regulations be instituted and that further enforcement of present regulations, unmodified, be enjoined. This is exactly the type of relief § 2281 reserves for District Courts of three judges."

Sands, supra, at p. 25. As a result, a three-judge court was required.

The third combined case in *Sands, supra,* was *Guajardo, et al.* v. *Estelle,* No. 72-3351, which was a class action brought by state prisoners challenging the official practice of reading and censoring inmate correspondence. During trial new regulations were proposed by state officials and presented to the district court. The Court entered a decree which modified certain regulations, while striking four others in their entirety. The Court of Appeals rejected the action of the Court because it was "in direct contravention of the mandate of 28 U.S.C. § 2281," *Sands, supra,* at p. 26, where the regulations had statewide applicability.

The fourth principle regarding convening a three-judge court (p. 3, above) is reflected in the fourth combined case in *Sands, supra, Guajardo* v. *McAdam,* No. 73-1497. *McAdams, supra,* questioned the constitutionality of a statewide prison "practice" of separating inmates for non-punitive reasons without providing a hearing. The Court of Appeals concluded that where the injunction sought by the petitioner would result in changes through-

out the statewide prison system in the State of Texas, a three-judge court would be required. As the Court of Appeals stated,

> "the obligation to call for a three-judge court fell upon the district judge when he became aware that, in order to grant the relief requested, the court would have to issue the type of injunction prohibited by § 2281; the obligation is not contingent upon plaintiffs' ultimate success or failure."

Sands, supra, at p. 29. In this regard the Government's Complaint alleges that the defendants and their agents have failed in their affirmative duty to provide specific measures and timetables to eliminate dualism, and also seeks additional relief throughout the State system beyond the initial request for an injunction. Specifically,

> "The United States prays that defendants be required to develop, submit and implement detailed plans which promise realistically and promptly to eliminate all vestiges of a dual system of higher education existing within the State of Louisiana." [15]

As a result of the government's request for relief affecting a statewide policy, it is required that a three-judge court be convened under 28 U.S.C. § 2281, and that the Chief Judge of the Court of Appeals for the Fifth Circuit be notified pursuant to 28 U.S.C. § 1984.

Finally, the Court of Appeals noted in *Sands, supra*, that its interpretation of 28 U.S.C. § 2281 could result in increased numbers of three-judge courts, because "unfortunately, the technical and jurisdictional nature of § 2281 does not permit us to incorporate equitable considerations into our decision." *Sands, supra*, p. 30. Notwithstanding the possibility of increased § 2281 litigation, the Court of Appeals stated that,

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[15] Complaint, page 13.

> "We are not unmindful that this result may raise the haunting specter of hundreds or even thousands of three-judge courts, convened to hear civil rights suits brought by prison inmates and other classes of litigants. If that prospect becomes reality, with its accompanying burden on judicial resources, we can only plead that we were powerless to obviate it. We have taken no bold new steps today, but have merely followed in the footsteps of our predecessors. The statutory strait jacket and Supreme Court commands leave us no maneuver to unshackle these cases from the outmoded confines of a § 2281 court.[16]

Indeed, the en banc Court of Appeals in *Sands*, *supra*, is in unanimous agreement that when a Complaint (1) seeks injunctive relief, (2) raises a substantial constitutional question, (3) affects a statewide policy, practice or regulation, and also (4) seeks relief which requires systemwide changes throughout the State, then a three-judge court is required under 28 U.S.C. § 2281.

Respectfully submitted,

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Assistant Attorney General

/s/ John H. Newman
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[16] *Sands*, *supra*, at page 31.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

No. 74-68

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF LOUISIANA, *et al.*,
Defendants.

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(1) Requesting Judge: Honorable E. Gordon West
Middle District of Louisiana

(2) District Judge: Honorable Alvin B. Rubin
Eastern District of Louisiana

(3) Circuit Judge: Honorable John Minor Wisdom

(4) Date of Order: March 28, 1974

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-judge court is not a prejudgment, express or implied, as to

whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate.

/s/ John R. Brown
JOHN R. BROWN
Chief Judge
Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

CONSENT DECREE

[Filed Aug. 29, 1981]

INTRODUCTION

This action was commenced on March 14, 1974 by the United States, through its Attorney General, to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (hereinafter referred to as "Title VI"). This Court has jurisdiction of this action pursuant to Sections 601 and 602 of Title VI, 42 U.S.C. §§ 2000d, 2000d-1 and 28 U.S.C. § 1345.

In its complaint, the United States alleged that the defendants, the State of Louisiana and its agents exercising management and control of public colleges and universities, established and have maintained a racially dual system of public higher education in violation of the Fourteenth Amendment and Title VI. The United States further alleged that the defendants had failed to develop

and implement detailed plans which "promise realistically and promptly to eliminate all vestiges of a dual system of higher education existing within the State of Louisiana."

Defendants denied plaintiff's allegations and asserted that public insitutions of higher education in the State of Louisiana are in full compliance with the Fourteenth Amendment and Title VI. Defendants further asserted that they have maintained non-racial open admissions policies and non-racial employment policies and have taken other action to comply fully with the letter and spirit of the Fourteenth Amendment and Title VI.

The parties have actively and in good faith conducted negotiations and, as indicated by the signatures of their counsel, have reached agreement on the provisions set forth below. The parties waive the entry of findings of fact and conclusions of law, and each party agrees to bear its own costs.

After reviewing its terms, the Court has determined that this decree is consistent with the objectives of the Fourteenth Amendment and Title VI and that its entry will further the orderly resolution of this case. It is the specific understanding of the parties and of this Court that neither this Consent Decree nor defendants' consent thereto constitute an admission by defendants or an adjudication by the Court of any violation of law by defendants.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the defendants State of Louisiana, et al, shall implement in good faith the commitments set forth below and that the parties shall be bound by the following:

PART I

DEFINITIONS

A. "Higher education board" refers to each of the following: the Louisiana Board of Regents, the Board of

Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical College and the Board of Trustees for State College and Universities.

B. "Predominantly black institution" refers to each of the following: Grambling State University, Southern University-New Orleans, Southern University-Baton Rouge and Southern University-Shreveport.

C. "Predominantly white institution" refers to each of the following: Louisiana Tech University, University of Southwestern Louisiana, McNeese State University, Nicholls State University, Northeast Louisiana University, Southeastern Louisiana University, Northwestern State University, Louisiana State University-Baton Rouge, the University of New Orleans, Louisiana State University-Shreveport, Louisiana State University-Alexandria, Louisiana State University-Eunice, Paul M. Hebert (LSU) Law Center, Louisiana State University Medical Center (in New Orleans and Shreveport), Delgado Junior College, St. Bernard Community College and Bossier Parish Community College.

D. "Predominantly white professional school" refers to each of the following: Louisiana State University Medical Center (in New Orleans and Shreveport), Paul M. Hebert (LSU) Law Center in Baton Rouge and Louisiana State University School of Veterinary Medicine.

E. "Predominantly black professional school" refers to the Southern University Law School in Baton Rouge.

F. "Proximate institutions" refers to the following groupings of public institutions of higher education: University of New Orleans and Southern University in New Orleans; Louisiana State University and Southern University in Baton Rouge; Louisiana State University-Shreveport, Southern University in Shreveport and Bossier Parish Community College; and Grambling State

University and Louisiana Tech University in Lincoln Parish.

G. "Other-race students" and "other-race faculty" refer to white students and white faculty members with respect to predominantly black institutions, and black students and black faculty members with respect to predominantly white institutions.

PART II

COMMITMENTS OF DEFENDANTS

Section One: Governance

The State of Louisiana is committed to representation on each of the higher education boards without regard to race. The State adopts the goal of increasing the other-race representation on the Louisiana Board of Regents, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, and the Board of Trustees for State Colleges and Universities so that the composition of the membership of each board approximately reflects the racial composition of the State's population. The State adopts, as an interim six-year goal, the goal of increasing the other-race representation on the Board of Supervisors of Southern University and Agricultural and Mechanical College so that the racial composition of the Southern University Board of Supervisors reflects the racial composition of the State's population inversely. The State shall take affirmative steps to achieve these goals as early as practicable but within a period not to exceed six years.

Section Two: Increased Student Access

A. *Equal Access* To assure equal access to Louisiana's public higher education institutions for all of the State's citizens, the State adopts the goal that the proportion of black high school graduates throughout the State

who enter public institutions of higher education shall be equal to the proportion of white high school graduates throughout the State who enter such institutions. For the purpose of this Consent Decree, the United States and the State have determined that, based upon the best available data, the statewide disparity in college-going rates for black and white high school graduates is approximately 6.5 percent. The State shall annually recalculate the disparity in college-going rates for black and white high school graduates. The State shall implement all programs provided in this Consent Decree, as well as any other programs which the State may decide to use, in order to eliminate this disparity.

The State also adopts the goal that the proportion of qualified black Louisiana residents who graduate from undergraduate institutions in the state system and enter state graduate or professional schools shall be equal to the proportion of qualified white state residents who graduate from state institutions and enter state graduate and professional schools.

B. *Six-Year Institutional Student Goals* The public institutions of higher education have established other-race enrollment goals for first-time freshmen and the total number of undergraduate, graduate and professional students covering a six-year period. Table 1 shows the institutional goals for first-time freshman; Table 2 shows the institutional goals for undergraduate students; and Table 3 shows the institutional goals for graduate and professional students.

Interim goals for other-race enrollment at the predominantly black institutions will not be set for the first two years of this Consent Decree in order to enable those institutions to initiate implementation of commitments to enhance the institutions set forth in Section Seven, *infra*.

Recruitment of other-race students in order to achieve the goals describe in this Decree shall be conducted by the constituent institutions of the defendants. None of

the activities or programs described in this Decree requires any constitutent institution of the defendants to modify its academic standards for graduation in any program.

C. *Open Admission* The State shall maintain its current open admissions policy for all public higher education institutions for a period of six years from the date of entry of this Consent Decree.

D. *Informational Activities and Institutional Student Recruitment*

1. *Informational Activities.* The parties agree that affirmative steps should be taken to inform black and white students of the educational opportunities available at the State's public institutions of higher education, including the State's open admissions policy. Accordingly, the Board of Regents shall prepare and disseminate informational brochures and pamphlets designed to inform all citizens of educational opportunities available at state institutions and to encourage all citizens to attend other-race state institutions. The Board shall prepare and disseminate at least two such brochures. The Board shall prepare a brochure which, *inter alia*, lists all undergraduate institutions and the undergraduate programs offered by each such institution. The Board also shall prepare a similar brochure which lists all institutions which offer graduate and professional programs and describes the programs offered at each such institution. Both brochures shall provide the address of each institution and information on how to obtain application forms. Both brochures shall inform students of available financial assistance, contain a clearly stated nondiscrimination policy, and encourage other-race students to apply for admission. Further, both brochures shall be updated (as necessary) and disseminated annually for a period of at least six years.

An appropriate number of copies of the undergraduate brochure shall be sent to all public and private high schools, community colleges and vocational and technical institutions in Louisiana; and an appropriate number of copies of the graduate brochures shall be sent to each public and private four-year institution of higher education in the State. The Board shall send copies of both brochures to the personnel directors of major private and governmental employers within the State and make them available to the public by other appropriate means.

The above procedures will be utilized to inform both black and white Louisiana residents of the educational opportunities available at both the predominantly white and predominantly black institutions.

Additionally, the Board of Regents and the institutions shall seek to air public service advertisements on radio stations which have a large black audience, and the institutions shall advertise in local newspapers. The advertisements shall be run during the regular application period(s) for state institutions for a period of at least six years from the date of entry of this decree, and shall be designed to encourage other-race students to apply for admission to the various public institutions.

2. *Student Recruitment.* Each institution, both predominantly white and predominantly black, shall develop and submit to the Board of Regents for approval a student recruitment plan designed to attract other-race students. Each institution's plan shall contain specific strategies for recruiting other-race undergraduate, graduate, and professional students, as applicable. Each institution shall submit its student recruiting plan to the Board of Regents within thirty days following the entry of this Consent Decree, and the Board of Regents shall work with each institution to have an approval plan for all institutions within ninety days after the entry of this Consent Decree. The Board of Regents shall approve each institution's recruiting plan in writing. Each

institution shall review its recruiting plan annually for a period of six years to determine the need for revising the plan. An institution's failure to achieve its other-race student goals shall be a basis for determining alternative recruiting strategies for attracting other-race students and revising the institution's recruiting plan.

The following actions shall be taken with respect to student recruitment as part of a statewide recruitment effort:

(a) Each predominantly white institution shall employ a black and each predominantly black institution shall employ a white who shall have the primary responsibility for recruiting other-race students.

(b) To assist the institutions in identifying prospective other-race students, the Board of Regents shall obtain from ETS and the American College Testing Program, and provide to each institution each fall, a list of all Louisiana students (by race) still enrolled in high school who took the SAT or ACT and agreed to have their names released.

(c) Each institution shall send recruitment literature to each high school in its service area and encourage the high school to disseminate the same to all students, with particular emphasis given to reaching other-race students.

(d) The Board of Regents shall develop and provide to the predominantly white institutions which have graduate and professional programs a list of all black students expected to graduate during that school during year from public and private undergraduate institutions in Louisiana, and who agree to have their names released. The list shall provide the following information: name of each student, the student's major field, grade point average, and other relevant information. Each predom-

inantly white institution shall actively seek applications from qualified students whose names appear on the list. As the enhancement of appropriate predominantly black institutions is accomplished, the Board of Regents shall provide the same service, listing white students, to those institutions.

(e) The Board of Regents shall obtain and provide to all predominantly white institutions a list of all black students enrolled in Louisiana institutions of public higher education who take the Graduate Record Examination (GRE) and who agree to have their names released. Each predominantly white institution shall solicit applications from among qualified students whose names appear on the list. As the enhancement of appropriate predominantly black institutions is accomplished, the Board of Regents shall provide the same service, listing white students, to those institutions.

(f) The Paul M. Hebert Law Center and Southern University Law School shall obtain through the Board of Regents a list of students identified by race enrolled in Louisiana's public and private four-year institutions who have taken the Law School Admission Test (LSAT) and agree to have their names released. A comparable list of students who have taken the Medical College Admission Test (MCAT) and the Dental Admission Test (DAT) shall be supplied to the Louisiana State University Medical Center. The professional schools shall actively seek applications from among qualified other-race students who take the above-named examinations and whose names appear on the appropriate list.

E. *Access to High School Students* The Board of Regents and the Board of Elementary and Secondary Education have jointly developed, adopted and shall enforce

a policy that ensures that no Louisiana public institution of higher education will be denied equal access to public high schools to conduct student recruitment activities. In addition, each governing board shall adopt a policy which will prohibit institutions under its control from recruiting at any public or private high school, community college or any other educational institution that does not allow equal access to all public institutions of higher education for purposes of recruitment. All public and private high schools shall be informed of the equal access recruitment policy.

Section Three: Student Financial Assistance

In order to ensure that other-race students who are financially unable to attend a college may be afforded, to the extent possible, the opportunity to do so, state funds administered by the Governor's Commission on Services to Education and available to undergraduate and graduate students shall be administered in a manner so as to enable each institution to achieve its other-race enrollment goals.

In addition, the state shall establish a scholarship program to assist those institutions that offer professional programs in medicine, dentistry, and veterinary medicine to increase the level of other-race participation therein. Eligible students will receive a $5,000 scholarship per year. The program will have the potential of graduating a total of 108 other-race doctors/dentists and 30 other-race doctors of veterinary medicine at a total cost of $2,760,000. Persons accepted in the sixth year of the program will be guaranteed stipends for the remaining 3 years of the academic program if they remain in good academic standing. Tables 5 and 6 delineate the financial commitment to these programs.

The following shall apply to professional student scholarship programs:

A. The scholarship shall be used for educational purposes only and recipients shall not be precluded from receiving other financial assistance for which they may be eligible.

B. A recipient must remain in good academic standing to continue to participate in the program.

Section Four: Student Attritition and Developmental Educational Programs

The State shall take further affirmative steps to reduce any disparity between the proportion of black and white students completing and graduating from Louisiana public institutions of higher education. The State shall take the following actions aimed at reducing the disparity between black and white student attrition rates:

A. The Board of Regents shall adopt the model developmental education program(s) based on the recommendations in the "Report on Developmental Education in Louisiana Public Higher Education" completed in May 1981.

B. Each public institution of higher education shall develop a developmental education program based on the model and have it ready for implementation no later than the beginning of the 1982-83 school year.

C. Each institution shall provide effective administrative direction for the program, and designate a person responsible for the program.

D. The State shall fund approved developmental education programs at a level to ensure the viable operation of the program and in any event, the State Appropriation Formula value shall be no less than $65.65 per student credit hour. In addition, the special monies which have been provided to the predominantly black institutions for developmental education purposes shall be maintained either through state or federal initiatives for a period of no less than six years.

E. Each institution shall review its developmental education program annually to ensure the success of the program and take alternative steps where a program proves to be ineffective.

F. The Board of Regents shall have the responsibility of approving and monitoring the developmental education programs at all institutions. This responsibility shall include the collection and analysis of data necessary to determine the effectiveness of institutional efforts to reduce attrition rates of black *vis-a-vis* white students. The Board of Regents shall have the authority to recommend specific steps to improve the developmental education program at any institution that fails to successfully reduce the attrition rate of black students.

Section Five: Equal Employment Opportunity

A. The State shall adopt the goal that the proportion of black administrators, faculty, and staff employed at each Louisiana predominantly white public institution of higher education and staff employed by each higher education board shall be equal to the proportion of black individuals with the required credentials in the relevant labor market area. Additionally, the State shall adopt the goal that each predominantly black public institution of higher education shall increase its proportion of white administrators, faculty and staff. The attached Table 4 shows the other-race institutional employment goals, by EEO categories, for all institutions.

B. The employment goals in Table 4 for faculty and administrative positions were based primarily upon the availability of persons with terminal degrees. In the event that an institution does require a terminal degree for certain faculty or administrative positions, its goals should be modified to reflect the availability of persons possessing the qualifications actually required. In addition, the employment goals in Table 4 do not take into account the number of qualified black applicants who may

be identified through the faculty clearinghouse which will be established nor the number who will obtain their terminal degrees through the faculty development programs described below. The institutions shall revise their employment goals annually taking into account changes which may occur regarding the availability of qualified blacks for employment at state institutions and at the higher education boards.

C. Each institution shall take affirmative steps to identify prospective other-race applicants and solicit applications from such persons. Any institution which has not already adopted an affirmative action plan pursuant to the requirements of Executive Order 11246 shall adopt an affirmative action plan to identify the specific steps to be taken to achieve its employment goals. Each institution shall review its affirmative action plan annually and make such revisions as may be appropriate to improve its effectiveness. No affirmative action plan shall require an institution to discriminate unlawfully against anyone in order to increase other-race employment.

D. *Clearinghouse for Faculty and Professional Staff.* As one means of identifying qualified black persons for faculty and staff vacancies which occur at Louisiana's public institutions and on the staffs of higher education boards, the State shall establish and maintain a clearinghouse for the faculty and professional staff applicants. The primary purpose of the clearinghouse will be to maintain an extensive file of black applicants interested in being employed at Louisiana's public institutions of higher education and/or on the staffs of any higher education board. The Board of Regents shall establish the clearinghouse and have it in operation within 120 days after the date of entry of this Consent Decree.

In order to build and maintain the application file, the Board of Regents shall take the following steps:

1. Develop a brochure (information sheet) which describes the clearinghouse and how it operates, contains

a mailing address for potential users, and encourages minority persons to submit applications.

2. Send copies of the clearinghouse brochure to an appropriate person or higher education board in each state the Board of Regents believes will have a substantial number of potential users of the clearinghouse and request that the brochures be disseminated to higher education institutions that have a substantial minority enrollment in graduate programs.

3. Send copies of the clearinghouse brochures to the twenty-five largest predominantly black four-year colleges and universities and request that the brochures be disseminated to departments and schools within the institutions that have graduate and professional programs.

4. Work with the Southern Regional Education Board to implement the program and obtain additional applications through SREB which operate a similar program.

5. Advertise nationally, detailing the existence of the clearinghouse and encouraging interested persons to submit applications and maintain a current national list of applicants.

6. Work with Louisiana's institutions to disseminate information about the clearinghouse and to identify potential applicants who wish to be on file.

7. Maintain a file of information on black graduate students who are nearing the completion of the masters, doctoral or equivalent degrees at public and private colleges and universities in Louisiana and disseminate this information at least once a year to all public colleges and universities in Louisiana.

8. Employ at least one professioanl staff person on a full-time basis who will administer the clearinghouse; if additional support is needed, it will be provided by staff members of the Board of Regents. The responsibilities of the staff person shall include, among other things, main-

taining and updating the applicant file, and publishing and disseminating on a quarterly basis a registry of applicants for faculty and board staff positions.

9. Publicize the availability of a toll-free incoming (statewide) WATS line for the use of institutions and black applicants in Louisiana in adding information to the registry.

The State shall fund the clearinghouse at a level to ensure viable operation and, in any event, at no less than a level of $50,000 per year for a period of six years.

Each Louisiana public higher education institution and higher education board shall seek applications from qualified persons registered with the clearinghouse for all faculty and/or professional staff vacancies. Prior to filling any faculty or professional staff position, each institution and higher education board shall seek qualified persons registered with the clearinghouse. After the position is filled, the institution or higher education board shall notify the Board of Regents whether any clearinghouse applicants were interviewed (and if so, how many) and whether a clearinghouse person was hired. The administrator of the clearinghouse shall prepare an annual report specifying the number of applications received by the clearinghouse, the number of requests received from each institution for clearinghouse applicants, the number of offers of employment extended by each institution to clearinghouse applicants and the number of new hires by each institution from the clearinghouse.

E. *Board of Regents' Graduate Fellowship Program.* The State shall establish a Graduate Fellowship Program designed to increase the pool of other-race faculty qualified to teach at state institutions. The Graduate Fellowship Program is described below:

1. Each state institution will be required to provide documented evidence that efforts have been made to recruit other-race faculty.

2. Each year for a period of six years, ten persons will be selected to participate in the program. The participants will be awarded $10,000 annual stipends, and each participant will receive a maximum of three years' support. The awards will be made by the Board of Regents on the advice of interinstitutional faculty committees in the various disciplines involved. The faculty committees will consider, at a minimum, each nominee's college level grade point average, Graduate Record Examination score, letter of nomination and recommendation, and commitment to teach at an other-race public institution of higher education in Louisiana.

3. Annually for a period of six years, each predominantly white institution will be required to identify and document a maximum of three fields or disciplines in which its black faculty recruitment efforts have been unsuccessful because of a lack of qualified applicants; and each predominantly black institution will be asked to identify and document a maximum of three fields or disciplines in which its white faculty recruitment efforts have been unsuccessful because of lack of qualified applicants. Each four-year predominantly white institution shall nominate three black persons, and the Southern University System and Grambling State University each shall nominate one white person lacking the terminal degree to compete for one of the ten $10,000 stipends to support graduate study. The nominees must be chosen from the ranks of advanced graduate students or faculty, must be in a discipline specified by the Board of Regents from among those identified as lacking a qualified other-race applicant pool, and, upon completion of the terminal degree, must be willing to teach at an institution where he/she would be an other-race faculty member. A three-year teaching commitment will be required. All nominations for participation in the Graduate Fellowship Program must be from the institutions, and individuals shall not be allowed to apply directly to the Board of Regents to participate in the program.

4. Stipends may be used by full-time graduate students at any regionally accredited Louisiana institution offering the doctorate in the appropriate field or at any regionally accredited out-of-state institution offering the appropriate doctoral or advanced degree program.

5. All recipients, including persons accepted into the program in its final year, will be guaranteed stipends for three years if necessary to complete the terminal degree. Persons receiving Regents' Fellowships will be allowed to accept other financial assistance for which they are eligible, so long as such assistance does not necessitate agreements that will hinder progress toward the degree or commitments to teach in an other-race public institution of higher education in Louisiana.

6. Voluntary failure on the part of a recipient to honor the required three-year contractual commitment will result in the necessity to have the recipient repay stipends received in full, plus interest at the prevailing prime rate.

7. The attached Table 7 provides a year-by-year breakdown of the funding of the Board of Regents Graduate Fellowship Program.

F. *Southern University and Grambling State University Faculty Development Program.* In addition to the Board of Regents' Graduate Fellowship Program, the State recognizes the need to provide advanced educational opportunities for faculty members at Louisiana's predominantly black institutions as one means of enhancing programs at Grambling State and Southern Universities. The purpose of the program will be to allow faculty members at each institution who lack the terminal degree to take paid leaves of absence in order that they may obtain their terminal degrees. The program will be funded for six years as follows: Grambling State University will receive $70,000 annually and the Southern University System will receive $230,000 annually. Southern University (including all three campuses), Grambling

State University, their higher education boards, and the Board of Regents will work together to develop a detailed plan of the procedures and criteria to be used in the operation of the faculty development program at each institution.

Section Six: Cooperative Efforts of Proximate Institutions

A. *Development and Coordination of Cooperative Plans* The proximate institutions in the Lincoln Parish, Baton Rouge and New Orleans areas shall develop cooperative plans. Each plan will describe each cooperative endeavor in terms of its participants (students and/or faculty), the exact manner in which each program will be operated, funding needed to operate the program, the institutional official or staff member responsible for the program and the procedure to be used to monitor the program. The institutions shall adopt an administrative structure designed to ensure effective cooperation between the two institutions, and each institution shall designate a person responsible for the cooperative efforts.

B. The cooperative programs between the proximate institutions in each area shall include the following:

1. *Faculty Exchange Program* The institutions shall operate a faculty exchange program each year for a period of six years under which faculty members from each institution will teach courses at the other institution's main campus. Goals for other-race participation in the faculty exchange programs are set forth below. Additionally, each institution shall encourage other faculty members to participate in faculty exchange and to serve as guest lecturers. In seeking to reach its other-race employment goals, an institution shall not be entitled to take into account faculty members participating in the faculty exchange program.

2. *Student Exchange Program* The institutions shall operate a student exchange program each year for

a period of six years which program will result in students from each institution taking courses at the campus of a proximate institution. Goals for other-race participation in the student exchange program are set forth below. Additionally, each institution shall encourage other students to participate in student exchange. In seeking to reach other-race enrollment goals, an institution shall be entitled to take into account student participation in student exchange programs on the following basis: each nine credit hours taken by other-race students as part of an exchange program shall be counted as if an other-race student had enrolled at the institution for a semester or quarter of coursework, as the case may be.

3. *Dual or other Cooperative Degree Programs* Within six months after entry of this Decree, the institutions shall seek to identify areas in which they may offer dual degrees or other cooperative degree programs. Goals for the development of dual or other cooperative programs are set forth below.

4. *Other Cooperative Efforts* The institutions shall continue existing cooperative endeavors and seek to develop other areas in which the institutions may cooperate.

C. *Goals for Louisiana Tech and Grambling*

1. *Other-Race Faculty Exchange Goals*

Academic Year	Louisiana Tech Faculty Members at Grambling	Grambling Faculty Members at La. Tech
1982-83	5	3
1983-84	5	3
1984-85	5	4
1985-86	5	5
1986-87	5	5
1987-88	5	5

2. *Other-Race Student Exchange Goals*

Academic Year	Credit Hours Taken by La. Tech. Students at Grambling	Credit Hours Taken by Grambling Students at La. Tech.
1982-83	200	150
1983-84	300	200
1984-85	400	250
1985-86	500	300
1986-87	500	300
1987-88	500	300

3. *Goals for Dual or other Cooperative Degree Programs*

4 Programs

D. *Goals for Louisiana State University-Baton Rouge and Southern University-Baton Rouge*

1. *Other-Race Faculty Exchange Goals*

Academic Year	LSU-BR Faculty Members at SU-BR	SU-BR Faculty Members at LSU-BR
1982-83	20	10
1983-84	20	10
1984-85	20	10
1985-86	20	10
1986-87	20	10
1987-88	20	10

2. *Other-Race Student Exchange Goals*

Academic Year	Credit Hours Taken by LSU-BR Students at SU-BR	Credit Hours Taken by SU-BR Students at LSU-BR
1982-83	600	300
1983-84	750	500
1984-85	900	700
1985-86	1200	900
1986-87	1500	1100
1987-88	1500	1100

3. *Goals for Dual or Cooperative Degree Programs*

5 Programs

E. *Goals for University of New Orleans and Southern University-New Orleans*

1. *Other-Race Faculty Exchange Goals*

Academic Year	UNO Faculty Members at SUNO	SUNO Faculty Members at UNO
1982-83	5	3
1983-84	5	4
1984-85	5	5
1985-86	5	5
1986-87	5	5
1987-88	5	5

2. *Other-Race Student Exchange Goals*

Academic Year	Credit Hours Taken by UNO Students at SUNO	Credit Hours Taken by SUNO Students at UNO
1982-83	500	150
1983-84	750	250
1984-85	1000	350
1985-86	1250	450
1986-87	1500	550
1987-88	1500	550

3. *Goals for Dual or Cooperative Degree Programs*

3 Programs

Section Seven: Enhancement of Predominantly Black Institutions

A. *Caddo-Bossier Parish Area*

1. Within 30 days of the entry of this Consent Decree, a five-member panel of experts shall be designated. The thrust of the panel's study will be two-year program offerings at predominantly black and predominantly white public institutions in the Caddo-Bossier Parish area, but

the panel may review all post-secondary programs in the Caddo-Bossier Parish area as necessary. The panel will use, as part of its study, the Master Plan for Higher Education and other materials made available by the Board of Regents, the higher education governing boards and the Bossier Parish School Board. The panel shall recommend specific measures for the structure of public post-secondary education in the Caddo-Bossier Parish area relative to the allegations in plaintiff's amended complaint. The panel shall confine its study to the geographical area served by public post-secondary education institutions in Caddo and Bossier Parishes. The State of Louisiana, the Southern University System, Bossier Parish Community College, the LSU System and the United States shall each appoint one member of the panel, with the State's appointment being subject to the approval of Bossier Parish Community College, the LSU System and the Southern University System. The State shall provide at least $40,000 to compensate the experts appointed by the above-named defendants, and the United States shall compensate the expert it appoints.

2. Prior to beginning its study, the panel of experts will afford each party appointing an expert the opportunity to meet with the panel for the purpose of discussing all relevant issues.

3. The experts shall complete their study and make recommendations within six months after having been appointed.

4. Parties shall have 45 days to review the experts' study and to consult with one another in an effort to settle all outstanding issues pertaining to post-secondary education in the Caddo-Bossier Parish area.

5. If agreement among the parties is not reached within 45 days, each party shall have the right to petition the Court to set a hearing on issues still in dispute, and to submit said issues to the Court for resolution.

6. All parties herein agree that the Bossier Parish Community College shall continue its present operation without any action which might interfere with its operation or obstruct its funding, until the study has been completed and the parties and the Court have resolved all matters regarding this issue. Further, the participation in this Consent Decree by the Bossier Parish School Board and the Bossier Parish Community College is limited solely to the above stated study agreement and to the language and substance in this Section 7A, and they specifically reserve unto themselves all objections, motions, defenses or actions available to them now or which might become available in the future. If the issues under this section are not resolved amicably under the study plan, then the issue of liability and all other legal issues may be reurged in a separate proceeding by any affected party to this proceeding who shall not lose or waive any rights, actions or defenses. Bossier Parish School Board and the Bossier Parish Community College expressly deny any violation by them of the Constitution of the United States, Title VI or any other law, regulation, rule, criterion or Executive Order and do not waive any previously contested issue or issues. The parties to this Decree acknowledge that Bossier Parish School Board and Bossier Parish Community College take the position that they are in the same legal posture as if this Consent Decree were not entered except as provided in this Section 7A.

7. All parties reserve all rights with respect to all issues affecting two year post-secondary education in the Caddo-Bossier area; and except as set forth in this section 7A, the provisions of this Consent Decree shall not be binding on any party with respect to the issues in this section.

B. *Enhancement of Academic Programs* The state shall strengthen and enhance the roles of its predominantly black institutions in the State system of public

higher education, and increase their capability to attract other-race students, by strengthening existing programs and by locating new academic programs at those institutions. It is agreed that the programs listed below shall be implemented in a timely manner and in accordance with established state policies regarding educational quality. The Board of Regents will waive the one-year notice of intent requirement for said programs and will assist the institutions to assure approval thereof.

The predominantly black institutions shall implement the programs designated below at the earliest practicable date. The parties recognize, however, that these institutions may require more than six years to develop and implement these programs. In that event, the State shall maintain its commitment to develop and fund these programs at the predominantly black institutions.

1. *Lincoln Parish* The following programs shall be approved by the Board of Regents in accordance with state policy relative to educational quality as modified with respect to the one-year notice of intent requirement and shall be established at Grambling State University:

(a) New Programs

(1) School of Nursing (four-year B.S. degree)

(2) Joint baccalaureate degree programs with the Louisiana State University Medical Center shall be established in the fields of medical technology, physical therapy, cytotechnology, occupational therapy, rehabilitation counseling and cardiopulmonary science.

(3) Students pursuing the joint health programs listed in (a)(2) above may be awarded an Associate of Science (A.S.) degree by Grambling State University upon completion of two years of general education.

(4) Public Administration (M.P.A.) which will emphasize Political Science.

(5) Master of Arts in Teaching (M.A.T.) in:

—Social Science
—Natural Science
—Humanities

(6) Social Work (M.S.W.)

(7) Criminal Justice (M.S.)

(8) Developmental Education (M.S., Ed. S., Ed. D.)

(9) Science Education (M.S.)

(b) New Cooperative Programs

The programs outlined in (1) and (2) below will involve the granting of degrees by Grambling State University with the cooperation of Louisiana Tech:

(1) Business Administration (M.B.A.) with options in:

—Informational Systems
—Administration
—Computer Science

(2) International Business and Trade (M.S.)

2. *Baton Rouge* The following programs shall be approved by the Board of Regents in accordance with state policy relative to academic quality as modified with respect to the one-year notice of intent requirement and shall be established at Southern University-Baton Rouge:

(a) School of Nursing (B.S.)

(b) Joint baccalaureate degree programs with the Louisiana State University Medical Center shall be established in the fields of medical technology, physical therapy, cytotechnology, occupational

therapy, rehabilitation counseling and cardiopulmonary science.

(c) Rehabilitation Psychology (B.S., M.S.)

(d) School of Accountancy (six-year professional degree)

(e) Professional Accountancy (D.P.A.)

(f) Special Education (M.Ed., Ed.S., Joint with LSU-BR; Ed. D., Ph.D., Separate at SU-BR)

(g) Environmental Chemistry (B.S.)

(h) School of Public Policy and Urban Affairs (M.P.A. in cooperation with LSU-BR with SU-BR granting the new degree with political science emphasis and relating existing SU-BR degrees)

(i) Computer Science (M.S.)

(j) Center for Small Farm Research

The State agrees to a faculty and student exchange program in nursing between Southern University-Baton Rouge and Southeastern Louisiana University. Two faculty members from each institution shall each teach at least one course at the other institution during each academic year provided that such courses are approved by each institution. Each student enrolled in one of the programs shall enroll in no less than one course offering at the other institution at the junior or senior level, depending on the programs' abilities to absorb the increased enrollment. Since Southeastern students spend their junior year (and part of their senior year) in Baton Rouge, the exchange program shall become effective simultaneously with the acceptance of students to the junior year of the Southern University program. The State accepts as a goal the achievement of a 25% other-race student presence in each program.

3. *New Orleans* The following programs shall be approved by the Board of Regents in accordance with state

policy relative to academic quality as modified with respect to the one-year notice of intent requirement and shall be established at Southern University-New Orleans:

(a) School of Social Work (M.S.W.)

(b) Substance Abuse (B.S.)

(c) Joint baccalaureate degree programs with the Louisiana State University Medical Center shall be established in the fields of medical technology, physical therapy, cytotechnology, occupational therapy, rehabilitation counseling and cardiopulmonary science.

(d) Students pursuing the joint allied health programs listed in 3(c) above may be awarded an Associate of Science (A.S.) degree by SUNO upon completion of two years of general education.

(e) Print Journalism (B.A.)

(f) Urban Studies (B.A.)

(g) Criminal Justice (B.S.)

(h) Computer Science (A.S.)

(i) Technology (B.S.) emphasizing engineering, occupational safety and media technologies.

(j) Transportation (B.S.)

4. The State agrees to fund all of the above new programs at a level to make the programs viable and capable of attracting students of all races to those institutions. Each institution shall prepare a proposal for each new program which will include, among other things, a description of the program or school; the estimated costs of planning (including cost of consultants; where necessary) and implementing the program or school (including salaries for new personnel); and the projected implementation date. The estimate shall also include the costs of special equipment necessary to implement and operate

the program as well as necessary new facilities. The institutions shall work with the Board of Regents in determining the cost of each program. The Board of Regents shall agree to recommend funding to the Legislature, allowing for inflationary increases for programs which will not be implemented immediately.

5. As regards the joint allied health programs referred to above, the State will provide for the employment at each specified institution of an allied health counsel and one support staff. These individuals will be joint appointments of both the LSU Medical Center and the respective predominantly black institutions, paid for through the budget of the LSU Medical Center. They will serve full time on each of the predominantly black campuses, and the counselor may teach one or two courses in the basic sciences.

C. *Future Program Considerations* Additionally, the following programs will be considered for implementation at the predominantly black institutions.

1. Grambling State University
   (a) Gerontology (B.S.)
   (b) Science Education (M.Ed., Ed.D.)
   (c) Elementary Education (Ed.D., Ph.D.)
   (d) School of Law (J.D.)
   (e) Paralegal Studies (A.S.)
2. Southern University-Baton Rouge
   (a) Radiological Technology (B.S.)
   (b) Business Administration (M.B.A.) emphasizing labor-management relations
   (c) Early Childhood Education (B.S.)
   (d) Agribusiness (M.S.)

(e) Labor Management (M.S.)

(f) Adaptive Physical Education (M.S.)

3. Southern University-New Orleans

(a) Substance Abuse (M.S.)

(b) Criminal Justice (M.S.)

(c) Nursing (B.S.N.)

The programs listed in paragraph C above will be considered by the Board of Regents for implementation at the specified institution when the following conditions have been met: (1) all programs agreed to in Section 7B of this Consent Decree for that institution have been successfully implemented and (2) institutional and state studies document both sufficient need and potential quality to justify their implementation at the institutions specified above. Furthermore, the Board of Regents agrees that, if need for an additional state-supported School of Pharmacy is documented in the future, the resulting school will be placed at either Southern University-Baton Rouge or Southern University-New Orleans, as determined by the Board of Supervisors of Southern University. If in the future, the need for an additional publicly supported law school is documented, the new school will be established at Grambling State University.

D. *New Role, Scope and Mission Statements.* As a result of the programmatic changes at each predominantly black institution, the role, scope and mission statement of each institution (as stated in the Master Plan of 1978) shall be revised and the revised statement shall appear in the next update to the Master Plan. Management Boards and institutions shall participate in formulation of the revised statements. Plaintiff shall be provided with the revised statements at least sixty days prior to their publication in the Master Plan update.

E. *Commitments Regarding New Programs and Elimination of Programs.*

1. The Board of Regents shall give priority consideration to placing at a predominantly black institution any new law (at Grambling State University), nursing (Southern University in New Orleans) or pharmacy program (in the Southern University System) and any of the programs identified in paragraphs C (1), (2) (3) above, for which a need is established during the term of this Consent Decree. The Board of Regents will give special consideration to placing new high-demand, high-cost programs at predominantly black institutions.

2. Prior to the approval of any new program at any predominantly white institution, the Board of Regents shall assess the impact of implementing the program on the achievement of other-race enrollment goals at predominantly black institutions. The Board of Regents shall not approve any new program at a proxmate predominantly white institution which duplicates a program established at or approved for the proximate predominantly black institution.

3. In its decisions pursuant to any academic program review (baccalaureate, masters, professional or doctoral), the Board of Regents shall act consistent with the objective of enhancing predominantly black institutions. Should the Board of Regents decide to eliminate degree programs pursuant to any academic program review, it shall do so in a manner that does not disproportionately affect any predominantly black institution.

F. *Capital Improvements at Predominantly Black Institutions*

1. The State shall improve existing facilities and construct new facilities at its predominantly black institutions such that their physical plants will be comparable to those available at comparable predominantly white in-

stitutions. The parties agree that the new programs approved for each of the predominantly black institutions at New Orleans, Baton Rouge and Lincoln Parish will require the construction of one or more new facilities.

(a) The State shall provide capital outlays funds sufficient to meet the current physical plant needs of Grambling State University and Southern University, as identified in the Board of Regents' current recommendations for the five-year facilities plan as near as practicable.

(b) The State shall provide through the Board of Regents the amount of $148,000 for the purpose of conducting a study to determine the nature and extent of continuing deficiencies present in the physical plants of Grambling State University and Southern University, which study shall be completed no later than six months from the date of entry of this Consent Decree. The study shall include a facilities plan identifying capital outlay projects necessary to upgrade the physical plants of Grambling and Southern consistent with their newly defined missions and the goals of attracting other-race students.

(c) The facilities study shall be overseen by a committee comprised of an expert chosen by the Board of Regents and an expert chosen by the United States of America, who shall approve the charge given to the consultants conducting the study and review and recommend changes if necessary in the methodology and procedures to be used in conducting the study. The plaintiff will have thirty days to review the study prior to implementation of any recommended action.

2. The Board of Regents shall adjust its five-year capital outlay plan by January 1, 1983, to incorporate the recommendations of the facilities study, assigning

the highest priority to correcting deficiencies identified by the study, excepting emergencies, and the State shall provide capital outlay funds consistent therewith. The capital outlay requirements identified in the adjusted five-year capital outlay plan and any new facilities for predominantly black institutions will be funded and constructed as near as practicable in six years from the date of entry of this Decree.

G. *Increased Financial Support*

1. The Board of Regents shall amend the State Appropriation Formula to include a mechanism by which state appropriations per FTE law student at Southern University-Baton Rouge will be at least at parity with state appropriations per FTE law student at the Paul M. Hebert (LSU) Law Center. Additional funds in the amount of at least $285,000 per year shall be appropriated to Southern University for a period of six years for enhancement of its Law School.

2. The State shall ensure that Southern University and Grambling State University will receive appropriations reasonably necessary to fund the requirements of this Consent Decree.

(a) The State shall review the State Appropriation Formula, and shall determine whether allocations made during the terms of this Consent Decree pursuant to the Formula will be sufficient to fund the operating needs of Southern University and Grambling State University and to otherwise fund the requirements of this Consent Decree.

(b) If, upon review of the Formula, the State determines that the projected allocation pursuant to the Formula will not be sufficient to fund the operating needs of Southern University and Grambling State University or to otherwise fund the requirements of this Consent Decree, the State shall ap-

propriate funds outside the Formula so as to ensure sufficient funding of those institutions.

(c) The State shall provide funds through the Board of Regents not in excess of $200,000 for studies of the financial procedures, management practices, programmatic arrangements, space utilization and maintenance procedures of the predominantly black institutions. During the term of this Decree, the predominantly black institutions and their higher education boards shall continue appropriate procedures to assure effective financial, personnel and facilities management. The Consent Decree Monitoring Committee shall provide technical assistance to the predominantly black institutions and shall monitor their progress in achieving this goal.

(d) The State shall provide additional funds in the amount of $1,000,000 per year for six years to be appropriated as follows: (1) $373,000 appropriated to Grambling State University; (2) $627,000 appropriated to the Southern University System. These funds are to be utilized for the general enhancement of the institutions, subject to the approval of the appropriate higher education board, the Board of Regents and the Governor or his designee.

Section Eight: Monitoring and Reporting

A. *Monitoring*

1. A committee, to be known as the Consent Decree Monitoring Committee, shall be established to monitor the compliance of the defendants with the requirements of this Decree.

2. The Consent Decree Monitoring Committee shall consist of nine members. Each higher education board shall appoint two members of the Committee, which representatives may be members of the board or its employ-

ees or employees of the institutions under its supervision. The Governor shall appoint one member of the Committee who shall serve as its Chairman.

3. The Consent Decree Monitoring Committee shall be funded through the Board of Regents which shall house the Committee and provide necessary staff, technical and clerical assistance. The Board of Regents shall assign at least one professional staff person to be available to assist the Committee on a full-time basis.

4. Within ninety days of the entry of this Decree, the members of the Consent Decree Monitoring Committee shall be appointed and the Committee convened by its Chairman. The Committee shall establish procedures for effectively monitoring compliance with the requirements of this Decree, for collecting data and filing all reports required thereunder and for making recommendations to assist in the achievement of the goals and objectives thereof.

5. The higher education boards and the institutions under their supervision shall cooperate with the Consent Decree Monitoring Committee in furnishing necessary data and in otherwise carrying out the requirements of this Decree.

B. *Reporting* On or before August 15 of each year, beginning on August 15, 1982, and annually thereafter throughout the term of this Consent Decree, the Consent Decree Monitoring Committee shall file with this Court and submit to the United States its annual report describing the actions taken by the defendants to fulfill the commitments set forth in this Consent Decree. Each annual report shall contain at least the following two components: a narrative assessment and a statistical report.

1. *Narrative Assessment* The narrative assessment shall describe in detail the efforts of each higher education board and each institution in the most recent academic year to implement the provisions of this Consent

Decree. The narrative assessment shall include, *inter alia*, the following information:

(a) A description of the specific actions which have been taken to implement the provisions of the Consent Decree and to otherwise achieve its objectives;

(b) A description of the results achieved, including quantitative indices where appropriate or required;

(c) An analysis of the reasons why any steps taken proved inadequate or insufficient; and

(d) A description of any alternative actions the State, its higher education boards or the institutions might take to achieve progress toward the goals and timetables set forth in the Consent Decree.

2. *Statistical Report* The statistical report shall include comprehensive data including, *inter alia*, statistics on student enrollment, faculty and staff employment, academic program inventories, operating and capital outlay budgets and other data which is reasonably necessary in order to enable this Court and the United States to evaluate the progress which has been made in achieving the goals and in implementing the programmatic and financial commitments contained herein.

The defendants shall provide to the United States, at its request and upon reasonable notice, the opportunity to inspect additional documents and other materials containing information which may be necessary from time to time in order to determine the effectiveness of the defendants' efforts to implement the provisions of this Consent Decree.

PART III

EFFECT OF DECREE

A. This Decree resolves all issues in contention between plaintiff and defendants in this lawsuit relating

to compliance with and enforcement of the Fourteenth Amendment and Title VI.

B. The defendants' compliance with this Decree, or any modification thereof, as between the parties, shall be deemed compliance with the Fourteenth Amendment and Title VI as to all matters addressed hereunder this Decree.

C. No party waives the right to raise any previously contested issues or any issues addressed in this Decree or in this lawsuit should litigation ensure at the expiration of this Decree or at any time prior thereto. Specifically, the defendants do not waive their contention that the Amended Criteria Specifying Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 42 Fed. Reg. 40,780 (1977), and the Revised Criteria Specifying The Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6, 658 (1978), are both statutorily and constitutionally defective; that the plaintiff does not have the right to prescribe, guide, or evaluate curricular, programs, program content, or the institutional location of program or course offerings, it being the position of the defendants that such decisions are reserved to the defendants by the First Amendment of the Constitution and laws of the United States; that the plaintiff's actions have denied Louisiana its right of constitutional equality and have denied the students, faculty, and administration of the constituent institutions of the defendants due process and equal protection of the law as guaranteed by the Fifth Amendment of the Constitution of the United States. Moreover, by consenting to the provisions of this Decree, the defendants do not concede that numerical assessments of the racial composition of the constituent institutions of the defendants are a constitutionally or statutorily permissible measure of compliance with the Fourteenth Amendment or Title VI, it being the position of the defendants that such numerical assess-

ments are constitutionally and statutorily prohibited or unauthorized. Specifications of these issues does not constitute a waiver of the right of the parties to raise any issue whatsoever.

PART IV

JURISDICTION

This Court shall retain jurisdiction of this action to assure the implementation of the provisions of this Decree; to monitor the effect of the actions taken pursuant to this Decree; to insure that the Louisiana system of public higher education is operated on a unitary basis in all respects; and to consider any motions to modify provisions of this Decree or other appropriate pleadings in this case, subject to the provisions of Part V., *infra*.

PART V

TERM OF DECREE

A. This Decree shall become effective immediately upon the date of its entry by the Court and shall remain in effect until at least December 31, 1987. The Court shall retain jurisdiction over the case until December 31, 1987.

B. If any party, prior to December 31, 1987, has commenced proceedings either to seek compliance with this Decree or to seek other relief necessarily implicating this Decree, this Court shall retain jurisdiction over this action until all issues relating to such proceedings have been resolved.

C. On December 31, 1987, this Decree shall terminate automatically and without further formality unless the plaintiff by motion requests this Court to conduct a hearing for the purposes of determining whether the defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis.

D. Should this Court determine, at the time of the hearing, that the State of Louisiana and all defendant higher education boards have effectively implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis, the defendants shall be released from the jurisdiction of this Court and this Decree shall be terminated. In such hearing brought upon motion of the plaintiff, the burden of proof shall be upon the plaintiff to prove that the defendants have not fully implemented the provisions of this Decree.

E. Should this Court determine at the time of the hearing that any provision of the Consent Decree has not been effectively implemented or that the defendants are not operating the system of public higher education in a manner consistent with the goals and objectives of this Decree, this Court shall enter such orders as are necessary to provide additional or further relief as is appropriate and shall retain jurisdiction until such implementation has been accomplished.

PART VI

NONADMISSION AND NONDETERMINATION

A. By entering into this Decree, no party admits and the Court has not made any determination that there is or has been a violation of the Constitution of the United States, Title VI, or any other law, regulation, rule, criterion, or Executive order. No findings of any kind have been issued by the Court substantiating any allegations made by any party.

B. Neither the agreement to entry of this Decree nor anything in this Decree shall be construed to be, or shall be admissible in any proceedings as evidence of, an admission by defendants of any violation of the Fourteenth Amendment, Title VI, or any other law, regulation, rule, criterion, or Executive order.

C. Each defendant expressly denies any violation by it of the Constitution of the United States, Title VI, or any other law, regulation, rule, criterion, or Executive order.

PART VII

COMPLIANCE STANDARD

A. The defendants shall make good faith effort to achieve and implement the goals and commitments of this Consent Decree. The goals provided for in this Decree are not to be construed as quotas and therefore the failure to achieve any goal shall not in itself constitute noncompliance with this Decree.

B. The parties recognize that steps which appear to be feasible as of the date of entry of this Decree may be thwarted by factors beyond the control of the defendants. Should such factors cause nonperformance of specific actions or nonattainment of specific numerical goals, and provided that reasonable alternatives to overcome the effects of such external factors have been pursued, the defendants may move this Court to be relieved of the obligation to take such actions or attain such goals, provided, however, that on any such motion, the defendants shall have the burden of proof.

CONSENT DECREE entered into and approved at New Orleans, Louisiana, on this 8th day of September, 1981.

/s/ John Minos Wisdom
United States Judge

/s/ Schwartz, Jr.
United States Judge

/s/ Veronica D. Wicker
United States Judge

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TABLE 1

SIX YEAR STUDENT ENROLLMENT PROJECTIONS FOR FIRST-TIME FRESHMEN FOR ALL PREDOMINANTLY WHITE PUBLIC INSTITUTIONS OF HIGHER EDUCATION

(Percent Black)

	Undergraduate Enrollment * '80-81 96B	Projected '82-83 96B	Projected '83-84 96B	Projected '84-85 96B	Projected '85-86 96B	Projected '86-87 96B	Projected '87-88 96B
Delgado	38.6	39.0	39.0	39.0	40.0	40.0	40.0
LA Tech	9.7	10.9	12.1	13.3	14.5	15.7	17.0
McNeese	16.8	17.0	17.2	17.4	17.6	17.8	18.0
Nicholls	12.6	14.3	16.0	17.7	19.3	21.0	22.7
Northeast	25.5	26.0	26.5	27.0	27.5	28.1	28.7
Northwest	22.8	23.7	24.6	25.6	26.6	27.6	28.6
Southeast	11.1	11.5	12.0	12.5	13.0	13.5	14.5
Southwest	21.7	21.7	21.7	21.7	21.7	21.7	21.8
LSU-Alex.	10.2	11.0	11.9	12.7	13.6	14.4	15.3
LSU-Eunice	12.1	13.6	15.1	16.6	18.1	19.6	21.2
LSU-S	6.0	7.1	8.2	9.4	10.6	11.8	13.0
LSU-BR	9.6	11.0	12.4	13.8	15.2	16.6	18.0
U.N.O.	20.9	21.9	22.9	23.9	24.9	25.9	27.0

TABLE 2

SIX YEAR STUDENT ENROLLMENT PROJECTIONS FOR OVERALL OTHER-RACE UNDERGRADUATE ENROLLMENT FOR ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION

Total	Actual 96W	'80-81 96B	Projected 96W	'82-83 96B	Projected 96W	'83-84 96B	Projected 96W	'84-85 96B	Projected 96W	'85-86 96B	Projected 96W	'86-87 96B	Projected 96W	'87-88 96B
Delgado		38.6		38.8		39.0		39.3		39.5		39.7		40.0
La Tech		9.1		9.7		10.4		11.0		11.7		12.35		13.0
McNeese		14.1		14.2		14.4		14.5		14.7		14.8		15.0
Nicholls		13.3		14.3		15.3		16.3		17.3		18.9		19.7
Northeast		21.3		21.6		21.9		22.1		22.4		22.7		23.0
Northwest		19.9		20.5		21.2		21.9		22.6		23.3		24.0
Southeast		9.5		9.7		10.0		10.3		10.5		10.7		11.5
Southwest		15.0		15.5		16.1		16.7		17.3		17.9		18.5
LSU-Alex.		10.4		11.0		11.6		12.2		12.8		13.4		14.0
LSU-Eunice		15.7		16.3		16.8		17.4		18.0		18.6		19.2
LSU-S		6.5		7.0		7.6		8.2		8.8		9.4		10.0
LSU-BR		6.0		7.1		8.3		9.4		10.6		11.8		13.0
U.N.O.		15.5		16.5		17.6		18.7		19.8		20.9		22.0
SU-BR							3.0		6.0		9.0		13.5	
SU-NO							3.0		6.0		9.0		13.5	
SU-S														
Grambling							3.0		6.0		9.0		13.5	

TABLE 3

SIX YEAR STUDENT ENROLLMENT PROJECTIONS FOR GRADUATE AND PROFESSIONAL PROGRAMS AT PUBLIC INSTITUTIONS OF HIGHER EDUCATION

School	Projected 1987-1988 96B
LA Tech.	14.0
McNeese	15.0
Nicholls	17.0
Northeast	22.9
Northwest	18.8
Southeast	20.7
Southwest	17.0
LSU-Shreveport	16.0
LSU-Baton Rouge	13.0
U.N.O.	18.5
PROFESSIONAL	
School of Veterinary Medicine *	10.0
School of Denistry *	8.0
School of Medicine-N.O.	11.0
School of Medicine-S	10.0
Paul M. Hebert (LSU) Law Center	7.5

* Louisiana Residents Only

As an annual interim goal, each institution will seek to increase its other-race presence by one-sixth of the difference between its actual 1981-1982 enrollment and its projected 1987-1988 enrollment.

TABLE 4

OTHER-RACE EMPLOYMENT GOALS BY INSTITUTION, BY EEO CATEGORIES

School	Executive Administrative And Managerial		Full-Time Faculty		Professional Non-Faculty		Secretarial And Clerical		Technical and Paraprofessional		Skilled Crafts		Service and Maintenance	
	1980	1986	1980	1986	1980	1986	1980	1986	1980	1986	1980	1986	1980	1986
Delgado	19.0	21.0	6.0	9.0	27.0	31.0	38.0	43.0	41.0	41.0	24.0	42.0	89.0	89.0
Grambling														
LA Tech.	1.3	5.2	1.1	3.0	0.0	3.0	1.2	5.0	0.0	7.8	8.0	9.0	85.1	85.1
McNeese	0.0	4.0	1.3	2.5	5.0	10.0	2.0	4.0	NA	NA	47.6	52.3	89.3	85.0
Nicholls	0.0	5.0	2.5	8.1	3.2	9.0	0.8	4.2	0.0	6.6	0.0	2.9	16.0	22.0
Northeast	6.0	7.0	3.0	6.7	8.0	10.0	8.0	8.0	5.0	5.0	30.0	27.0	86.0	84.0
Northwestern	0.0	4.5	0.4	7.6	0.0	9.5	8.4	18.5	20.0	30.0	42.1	49.0	81.4	81.4
Southeastern	2.0	5.8	1.2	3.2	5.4	8.8	2.5	7.5	0.0	18.0	15.0	17.2	48.0	48.0
Southwestern	4.8	8.0	1.3	5.0	5.6	10.0	7.1	12.0	13.7	15.0	32.3	32.3	19.6	22.0
LSU-Alexandria	0.0	8.8	0.0	3.9	0.0	11.1	4.3	13.0	NA	NA	0.0	25.0	73.3	73.3
LSU-Baton Rouge	3.4	5.1	2.2	3.3	10.0	13.9	11.5	12.5	11.6	15.9	36.2	36.2	84.2	84.2
LSU-Eunice	8.3	8.3	2.6	5.1	25.0	25.0	9.5	9.5	NA	NA	10.0	20.0	69.2	69.2
LSU-Shreveport	0.0	3.8	0.9	2.7	30.8	30.8	3.6	14.3	0.0	20.0	25.0	25.0	78.1	78.1
U.N.O.	6.5	6.5	3.0	3.9	8.0	10.4	19.0	19.0	21.9	21.9	26.8	26.8	76.0	76.0
SU-Baton Rouge	0.0	5.1	8.8	12.0	0.5	4.9								
SU-New Orleans	6.2	15.0	22.2	23.0	0.9	10.0								
SU-Shreveport														

TABLE 5

BOARD OF REGENTS
OTHER-RACE SCHOLARSHIP PROGRAM FOR
LSU-BR SCHOOL OF VETERINARY MEDICINE

	Amount	# of Stipends/Graduates
Year 1	$15,000	3 (1st yr. students)
Total	15,000	
TOTAL TO DATE	15,000	0 graduates
Year 2	15,000	3 (2nd yr. students)
	20,000	4 (1st yr. students)
Total	35,000	
TOTAL TO DATE	50,000	0 graduates
Year 3	15,000	3 (3rd yr. students)
	20,000	4 (2nd yr. students)
	25,000	5 (1st yr. students)
Total	60,000	
TOTAL TO DATE	110,000	0 graduates
Year 4	15,000	3 (4th yr. students)
	20,000	4 (3rd yr. students)
	25,000	5 (2nd yr. students)
	30,000	6 (1st yr. students)
Total	90,000	
TOTAL TO DATE	200,000	3 graduates
Year 5	20,000	4 (4th yr. students)
	25,000	5 (3rd yr. students)
	30,000	6 (2nd yr. students)
	30,000	6 (1st yr. students)
Total	105,000	
TOTAL TO DATE	305,000	7 graduates
Year 6	25,000	5 (4th yr. students)
	30,000	6 (3rd yr. students)
	30,000	6 (2nd yr. students)
	30,000	6 (1st yr. students)
Total	115,000	
TOTAL TO DATE	420,000	12 graduates
Year 7	30,000	6 (4th yr. students)
	30,000	6 (3rd yr. students)
	30,000	6 (2nd yr. students)
Total	90,000	
TOTAL TO DATE	510,000	18 graduates

Year 8	30,000	6 (4th yr. students)
	30,000	6 (3rd yr. students)
Total	60,000	
TOTAL TO DATE	570,000	24 graduates
Year 9	30,000	6 (4th yr. students)
Total	30,000	
TOTAL TO DATE	600,000	30 graduates

TOTAL Cost of Program	TOTAL # of Graduates
$600,000	30

TABLE 6

BOARD OF REGENTS
OTHER-RACE SCHOLARSHIP PROGRAM FOR
LSU MEDICAL CENTER

	Amount	# of Stipends/Residents
Year 1	$90,000	18 (1st year students)
Total	90,000	
TOTAL TO DATE	90,000	0 residents
Year 2	90,000	18 (2nd year students)
	90,000	18 (1st year students)
Total	180,000	
TOTAL TO DATE	270,000	0 residents
Year 3	90,000	18 (3rd year students)
	90,000	18 (2nd year students)
	90,000	18 (1st year students)
Total	270,000	
TOTAL TO DATE	540,000	0 residents
Year 4	90,000	18 (4th year students)
	90,000	18 (3rd year students)
	90,000	18 (2nd year students)
	90,000	18 (1st year students)
Total	360,000	
TOTAL TO DATE	900,000	18 residents
Year 5	90,000	18 (4th year students)
	90,000	18 (3rd year students)
	90,000	18 (2nd year students)
	90,000	18 (1st year students)
Total	360,000	
TOTAL TO DATE	1,260,000	36 residents
Year 6	90,000	18 (4th year students)
	90,000	18 (3rd year students)
	90,000	18 (2nd year students)
	90,000	18 (1st year students)
Total	360,000	
TOTAL TO DATE	1,620,000	54 residents
Year 7	90,000	18 (4th year students)
	90,000	18 (3rd year students)
	90,000	18 (2nd year students)
Total	270,000	
TOTAL TO DATE	1,890,000	72 residents

Year 8	90,000	18 (4th year students)
	90,000	18 (3rd year students)
Total	180,000	
TOTAL TO DATE	2,070,000	90 residents
Year 9	90,000	18 (4th year students)
Total	90,000	
TOTAL TO DATE	2,160,000	108 residents

Total Cost of Program	TOTAL Number of Residents
$2,100,000	108

TABLE 7

ANNUAL FUNDING FOR THE BOARD OF REGENTS GRADUATE FELLOWSHIP PROGRAM

Year	$ Amount	# of Stipends/Graduates
Year 1		
	$ 10,000 Admin.	0
	100,000	10 (1st year students)
Total	110,000	
TOTAL TO DATE	$ 110,000	0 graduates
Year 2		
	10,000 Admin.	0
	100,000	10 (2nd year students)
	100,000	10 (1st year students)
Total	210,000	
TOTAL TO DATE	$ 320,000	0 graduates
Year 3		
	10,000 Admin.	0
	100,000	10 (3rd year students)
	100,000	10 (2nd year students)
	100,000	10 (1st year students)
Total	310,000	
TOTAL TO DATE	$ 630,000	10 graduates
Year 4		
	10,000 Admin.	0
	100,000	10 (3rd year students)
	100,000	10 (2nd year students)
	100,000	10 (1st year students)
Total	310,000	
TOTAL TO DATE	$ 940,000	20 graduates
Year 5		
	10,000 Admin.	0
	100,000	10 (3rd year students)
	100,000	10 (2nd year students)
	100,000	10 (1st year students)
Total	310,000	
TOTAL TO DATE	$1,250,000	30 graduates
Year 6		
	10,000 Admin.	0
	100,000	10 (3rd year students)
	100,000	10 (2nd year students)
	100,000	10 (1st year students)
Total	310,000	
TOTAL TO DATE	$1,560,000	40 graduates

Year 7			
	10,000	Admin.	0
	100,000		10 (3rd year students)
	100,000		10 (2nd year students)
Total	210,000		
TOTAL TO DATE	$1,770,000		50 graduates
Year 8			
	10,000	Admin.	0
	100,000		10 (3rd year students)
Total	110,000		
TOTAL TO DATE	$1,880,000		00 graduates

Cost of Total Program	Total # of Graduates
$1,880,000	60

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

JOIN MOTION TO APPROVE CONSENT DECREE

Come, now, the undersigned counsel, and jointly move this Honorable Court to approve, adopt and confirm the Consent Decree, a copy of which is attached hereto and made a part hereof.

Respectfully submitted:

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UNITED STATES DISTRICT COURT
E. D. LOUISIANA

Civ. A. No. 80-3300

UNITED STATES OF AMERICA

v.

STATE OF LOUISIANA

Sept. 8, 1981

Further Articulation of Reasons for
Approval Nov. 30, 1981

Before WISDOM, Circuit Judge, and SCHWARTZ and WICKER, District Judge.

ORDER AND REASONS FOR APPROVING ENTRY OF CONSENT DECREE

CHARLES SCHWARTZ, Jr., District Judge.

This cause came on for hearing on this date to determine whether the Court should adopt the consent decree of the parties. Amicus Curiae representing Grambling State University concurs. Amicus Curiae The National Associaiton for the Advancement of Colored People and Dr. Gladys W. Millinar representing herself and the class of faculty members of Southern University in New Orleans have filed memoranda urging the Court to reject the compromise.

It has always been a basic premise of our adversary system of justice that settlements of law suits by agreement of the parties are favored. Further, with respect to discrimination cases, a basic philosophy which has become hornbook law is that voluntary compliance is preferable to court action.

This Court has since April 30, 1980 conducted at least eight lengthy pre-trial conferences with the parties in an effort to prepare the case for an orderly trial and to resolve the issues in dispute. It has had the opportunity to review the pre-trial statements and memoranda of the parties as well as the two amicus curiae filings in opposition to the proposed consent decee. Thus, it is cognizant and knowledgeable of the issues and contentions that pertain to this litigation. Moreover, by reason of representations made to the Court it knows that those persons in an adversary position most familiar with the practices involved, including amicus representing Grambling State University, have spent many long hours in hard negotiations.

The law in this Circuit is that a proposed consent decree in a discrimination case is entitled to a presumption of validity unless the Court finds that it is unlawful, unreasonable, inequitable, or contrary to public policy. *United States v. City of Miami, Fla.*, 614 F.2d 1322 (5 Cir. 1980); *United States v. City of Alexandria*, 614 F.2d 1858 (5 Cir. 1980); accord: *State of North Carolina v. Department of Education*, No. 79-217-Civ. (U.S.D.C. North Carolina, Raleigh Division).

Apropos the conclusions we reach herein is the language which we borrow from *United States v. City of Miami*, supra, p. 1333,

> "When the remedy that is jointly proposed is within reasonable bounds and is not illegal, unconstitutional or against public policy, the courts should give it a chance to work."

Although the Court will at a later date further articulate the reasons for its conclusions stated herein, it is of the opinion that it would not be appropriate to further delay the parties from implementing the remedies they propose.

According since the Court finds that the proposed consent decree is not unlawful, unreasonable, inequitable or contrary to public policy it hereby APPROVES same and orders that it be entered by the Clerk of Court as a judgment of this Court.

FURTHER ARTICULATION OF REASONS FOR APPROVAL

This matter came on for hearing September 8, 1981 to determine whether the Court should adopt the consent decree proposed by the parties. The Court entered an order approving the consent decree on said date, and now sets forth a promised therein, the further articulation of the reasons for its approval.

This is only the latest of many federal cases to secure minority rights in Louisiana's public system of higher education.[1] Although this action was formally commenced on March 14, 1974,[2] the consent decree[3] may be justly

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[1] *See* for example: *Wilson v. Board of Supervisors*, 92 F. Supp. 966 (E.D. La. 1950); *Tureaud v. Board of Supervisors*, 116 F. Supp. 248 (E.D. La. 1953); *Ludley v. Board of Supervisors of L.S.U.*, 150 F. Supp. 900 (E.D. La. 1957)), aff'd 252 F.2d 372 (5th Cir.); *McCoy v. Louisiana State Board of Education*, 332 F.2d 915 (5 Cir. 1964).

[2] A complaint was filed by the United States on this date in the Middle District of Louisiana against the State of Louisiana, the Louisiana State Board of Education, and forty-two named individuals in their various capacities as officers of the governing boards of the Louisiana higher educational system: The Louisiana State Board of Education, the Louisiana Coordinating Council for Higher Education, the Louisiana State Board of Supervisors, and the Louisiana Board of Regents.

[3] Consent Decree of the parties dated September 8, 1981.

regarded as the culmination of negotiations which have extended over twelve years and which have involved almost every branch of state and federal government, as well as a variety of Amici. The consent decree is itself the product of over a year of hard negotiation, and it embodies a comprehensive desegregation plan which "promises realistically to work." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971). As we said in our September 8, 1981 order:

> When the remedy that is jointly proposed is within reasonable bounds and is not illegal, unconstitutional or against public policy, the courts should give it a chance to work. *United States v. City of Miami*, 614 1322, 1333 (5 Cir. 1980).

Although a trial court ordinarily plays little or no part in overseeing the settlement of a lawsuit, there are certain special situations in which court approval of a proposed settlement is required because important public interests are implicated. *United States v. City of Miami*, *supra* at 1330 (and cases therein cited). Consent decrees in discrimination cases require such approval since these cases raise substantial public questions in addition to those which concern the named parties. As noted in our original order, a proposed consent decree in a discrimination case is to be presumed valied by the trial court unless found to be unconstitutional, unlawful, contrary to public policy or unreasonable. *United States v. Miami*, *supra* at 1333-1334; *Cotton v. Hinton*, 559 F.2d 1326 (5 Cir. 1977); *see also Armstrong v. Board of School Directors of the City of Milwaukee*, 616 F.2d 305 (7 Cir. 1980).

After careful consideration of the contentions of counsel, the record, the law, and the proposed decree, the Court determined on September 8, 1981 for reasons therein and hereinafter set out, that the consent decree must be approved.

On March 14, 1974, the Atorney General commenced this action on behalf of the United States pursuant to the provisions of thhe Fourteenth Amendment ot the Constitution of the United States, and Title VI of the Civil Rights Act of 1964, codified as 42 U.S.C. § 2000d *et seq.*

In its complaint, the United States alleged: first, that the state of Louisiana and its agencies of higher education had established, maintained and were perpetuating an unlawful dual system of higher education based on race;[4] second, that the defendants were the recipients of substantial federal financial assistance and had agreed to comply with the provisions of Title VI, as well as all the requirements imposed by the regulations of the Department of Health, Education and Welfare issued pursuant to said Title; finally, the United States contended that its continued efforts from January 1969 until the date of the complaint to secure the defendants' voluntary compliance had failed, and that the defendants had steadfastly refused to submit a constitutionally acceptable plan to disestablish the dual system of public higher education. The United States sought injunctive relief, including the formulation and implementation of a detailed desegregation plan whereby the dual system could be promptly and completely dismantled. For their part, the defendants contended[5] (as they had since first contacted by HEW in 1969)[6] that the Lousiana School system of

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[4] The complaint was subsequently amended to reflect changes made to the governing structure of the Louisiana higher education system. After January 1, 1975, the old governing boards were superseded by four new boards: the Board of Regents, the Board of Trustees for State Colleges and Universities, the Board of Supervisors of Southern University and Agricultural and Mechanical College, and the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College. *See* L.S.A. Const. Art. 8.

[5] *See* Answer filed May 10, 1974, ¶ 14, and the defendant's Information for Preliminary Pre-Trial Conference filed May 2, 1980.

[6] Louisiana was one of many states which were the subject of an HEW evaluation of compliance with Title VI. In January 1960,

higher education was in full compliance with the provisions of Title VI and the Fourteenth Amendment.

Pursuant to 42 U.S.C. §§ 2000d, 2000d-1 and 28 U.S.C. §§ 1345, 2281, and 2284, a Three Judge Court was convened on March 28, 1974 to hear and determine the case.

Although the Court's involvement remained relatively limited between 1974 and the beginning of 1980, during this period the parties were engaged in discovery, the disposition of several overlapping cases and with certain issues of intervention. *See, e.g.: United States v. Louisiana*, No. 74-8856 (5 Cir. 1976).

On April 30, 1980, at the first of eight pre-trial conferences, the Court suggested that the parties explore the possibility of settling this action, thereby avoiding the substantial commitment of resources that would be necessary to bring the case to trial and through appeal.[7] The Court reasoned that an early settlement would not only result in a saving of judicial time, but would more importantly, allow the speedy vindication of minority rights. The consensual nature of an approved settlement provides, in comparison with a court order, a much surer foundation for fundamental change, and is much more likely to foster the full acceptance and commitment by all concerned that is necessary for any plan to realize its full potential.

The parties began active settlement negotiations in May of 1980, exchanged a number of settlement pro-

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HEW concluded Louisiana was operating a racially segregated system of higher education. Mississippi, Oklahoma, North Carolina, Florida, Arkansas, Pennsylvania, Georgia, Maryland and Virginia were subsequently found to be operating higher education systems in violation of Title VI. *See Adams v. Richardson*, 356 F. Supp. 92 (D.C. 1973) 94 and generally.

[7] The memorandum submitted by the United States in support of its Motion for Pretrial Conference dated March 13, 1980, contains the suggestion that this action could require twenty trial days.

posals, and conducted numerous negotiating sessions. These negotiations intensified in February of 1981, and by August, proposals were being exchanged on an almost daily basis. When accord was ultimately reached, the parties' proposed consent decree was presented and approved by the Court on September 8, 1981.

In approving the consent decree, the Court has carefully considered the provisions of the consent decree itself, the briefs of all counsel (including those of amici), the record, and the law. The factors hereinafter set out substantiate that in this particular action, the consent decree is within reasonable bounds and is not "unreasonable, inequitable, or contrary to public policy." *United States v. Miami, supra.* The consent decree is therefore entitled to a "presumption of validity," *id.*, and this Court's approval. The Court concludes that:

(A) The consent decree resulted from vigorous arm's length negotiations which were conducted by knowledgeable and experienced counsel. The Court has had many opportunities to become acquainted with counsel during conferences. It has also had ample opportunity to assess counsel's knowledge and skill in pleadings, memoranda, and briefs. The Court is convinced from its own observation, that the consent decree was the product of bona fide negotiations conscientiously conducted by capable attorneys.

(B) The record reflects that during the course of seven and a half years, the parties, counsel, and this Court have each devoted hundreds of hours to these proceedings. Substantial litigation expenses have been incurred by all the parties to this lawsuit. If this suit is not settled now, it might be several years, including appeals, before this matter could be resolved. The real victims of such delay would be those who stand to benefit most from the consent decree: minority students and

traditionally Black colleges.[8] The sooner that the measures contained in the consent decree designed to enhance Black colleges and speed the integration of the Louisiana system are implemented, the better.

(C) It is difficult to speculate about the precise injunctive relief this Court would have fashioned if the action had gone to trial and the plaintiff prevailed; however, the Court notes that the desegregation plan embodied in the Consent Decree is substantially similar to that which the parties might have formulated pursuant to a Court Order subsequent to factual findings by this Court of history of *de jure* segregation. The Court further notes that a desegregation plan arising in the context of a consent decree enjoys substantial advantages over an identical plan formulated pursuant to a court order. Implementation is likely to be more effective and acceptance speedier where, as here, the plan is not the result of a command from a court, but is rather, the result of conscientious effort and cooperation among educators, federal and state officials, in conjunction with responsible members of the community.

(D) The plan itself appears to be a sound one for achieving a unitary system of public higher education within a Constitutionally acceptable timetable. The Consent Decree provides a reasonable and comprehensive statewide approach to both the systematic integration of the Louisiana higher educational system, and the enhancement of its traditionally Black institutions.[9]

The Court, in evaluating the plan, has taken cognizance of the well recognized and important differences between higher education and elementary or secondary education. *Geier v. Dunn*, 337 F.Supp. 573, 578-580 (M.D.Tenn. 1972); *Adams v. Richardson*, 480 F.2d 1159, 1164 (D.C.

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[8] In particular, Grambling College and the Southern University System.

[9] See Consent Decree, II(7) pp. 17-26.

Cir. 1973); *Norris v. State Council of Higher Education*, 327 F.Supp. 1368, 1373 (E.D.Va. 1971) *aff'd per curiam*, 404 U.S. 907, 92 S.Ct. 227, 30 L.Ed.2d 180 (1971); *Sanders v. Ellington*, 288 F.Supp. 937, 943 (M.D.Tenn. 1968); *see also*, the Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 43 Fed.Reg. 6658, 6660 (February 15, 1973). Although there is now available a considerable record of experiences which the courts and other agencies of government have had in fashioning remedies for racial discrimination in primary and secondary schools, experience with state systems of higher education is limited and of only recent occurrence. *See Adams v. Richardson*, *supra* at 1164. Therefore the Court is, and should be, reluctant to substitute its own judgment for that of the parties, until after the plan here, as well as those proposed in other states,[10] have had a chance to work, or until experience has clearly demonstrated that measures which today seem promising are in fact not so. As educators, the Courts and members of government charged with enforcing anti-discrimination laws move into an unaccustomed area, perhaps all that is clear is that the well tested remedial measures that have proved effective in the context of primary and secondary education, must be abandoned in favor of untested measures more appropriate for eliminating discrimination in a university system.[11]

The Court finds that the Consent Decree's desegregation plan makes specific commitments to (1) shaping the

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[10] For example, Oklahoma, North Carolina, Florida, Arkansas, Georgia, Maryland and Virginia.

[11] For example, only under the most extraordinary circumstances would a district court consider compulsory student or faculty assignment in the context of higher education although such remedies have been used in the context of primary and secondary education. *See Lee v. Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala., E.D. 1967).

processes of admissions [12] and recruitment; [13] (2) solving the problem of student attrition (especially "other race" students); [14] (3) resolving the issues and problems arising out of program duplication, and the allocation of curricular offerings among the state's institutions; [15] (4) understanding the appropriate role to be played by traditionally Black institutions and making provisions for their immediate enhancement; [16] (6) taking substantial steps to achieve a more equitable balance in the racial composition of the staff, faculty, and governing boards of the university system.

The Consent Decree provides specific goals and timetables for increasing other race participation in every aspect of the university system's life.[17] These are reasonable, specific, and realistic. Happily, there is nothing which indicates the plan will lead to a lowering of academic standards in any way. On the contrary, in the long term, the plan seems likely to allow the system to marshal its considerable resources with considerably greater efficiency in the future than it has done in the past.

The consent Decree also provides a system-wide reporting system [18] which the Court believes will: (1) promote compliance with the plan; (2) make the process of monitoring the system's progress simple and inexpensive for both state and federal government personnel; and (3) provide all the parties, as well as the general public, a

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[12] Consent Decree, II(2)(c), p. 4.

[13] Consent Decree, II(2)(D), pp. 4-8.

[14] Consent Decree II(4), pp. 8-9.

[15] Consent Decree II(6) (A-E), pp. 14-16; II(7)(B) (1-3) pp. 18-22; II(7)(C), p. 22; II(7)(E), p. 23.

[16] See Footnote #9.

[17] See Consent Decree II generally, pp. 2-16.

[18] Consent Decree VIII, pp. 26-28.

quick and sure means of evaluating the merits of the plan as implemented, and to correct any unsuspected inadequacies which might be revealed thereby.

In summary the Court finds that the consent decree which it approved in its order of September 5, 1981 embodies a reasonable and specific system-wide desegregation plan which promises realistically to work.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

MOTION FOR HEARING

[Filed Dec. 29, 1987]

Pursuant to Part V of the 1981 Consent Decree [1] the United States, plaintiff, requests this Court to enter an order maintaining jurisdiction over this litigation, scheduling a hearing in the instant litigation for the purpose of determining whether defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis, preserving all privileges, obligations and rights of the parties hereto.

Part V of the 1981 Consent Decree states in pertinent part:

B. If any party, prior to December 31, 1987, has commenced proceedings either to seek compliance with this Decree, or to seek other relief necessarily implicating this Decree, this Court shall retain jurisdiction over this action until all issues relating to such proceedings have been resolved.

C. On December 31, 1987, this Decree shall terminate automatically and without further formality unless the plaintiff by motion requests this court to conduct a hearing for the purpose of determining

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[1] Reference here and hereafter to "Consent Decree" refers to the 1982 Addendum to Consent Decree as well as the 1981 Consent Decree.

whether defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis.

The Memorandum in Support of this Motion attached hereto is incorporated herein by reference.

WHEREFORE, the United States prays that this Court enter an order maintaining jurisdiction over this litigation, scheduling a hearing for the purpose set forth above, and scheduling a status conference for the purpose of assigning a hearing date, and preserving all privileges, obligations and rights of the parties.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al*

MEMORANDUM IN SUPPORT OF
MOTION FOR HEARING

Pursuant to Part V of the 1981 Consent Decree [2], the United States, plaintiff, requests this Court to enter an order maintaining jurisdiction over this action, scheduling a hearing for the purpose of determining whether defendants have fully implemented all provisions of this Decree and are opearting the system of public higher education on a unitary basis, and setting a status conference for the purpose of setting a hearing date, and preserving all privileges, obligations and rights of the parties hereto.

As grounds for the Motion, the United States avers as follows:

1. Part V of the 1981 Consent Decree statutes in pertinent part:

B. If any party, prior to December 31, 1987, has commenced proceedings either to seek compliance with

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[2] Reference here and hereafter to "Consent Decree" refers to the 1982 Addendum to Consent Decree as well as the 1981 Consent Decree.

this Decree, or to seek other relief necessarily implicating this Decree, this Court shall retain jurisdiction over this action until all issues relating to such proceedings have been resolved.

C. On December 31, 1987, this Decree shall terminate automatically and without further formality unless the plaintiff by motion requests this Court to conduct a hearing for the purpose of determining whether defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis.

2. Throughout the life of the 1981 Consent Decree the parties have monitored compliance with the Decree and efforts have been made to resolve problems and/or concerns through negotiation.

3. It is the evaluation of, *inter alia*, the plaintiff that all of the requirements of the Decree have not been fully and completely met.

4. The plaintiff has communicated to the defendants a description of the unfulfilled requirements.

5. The plaintiff has transmitted a proposal to resolve the remaining issues to the defendants.

6. The plaintiff and defendants have initiated negotiations concerning the plaintiff's proposal and to resolve outstanding issues.

7. While the parties believe that the outstanding issues can be resolved without protracted litigation and extensive consumption of the Court's time, it is required by pertinent provisions of the Consent Decree that the plaintiff file a motion requesting the Court to conduct a hearing as set out above.

WHEREFORE, the United States requests that this Court, for the reasons set out above and in the interest

of justice enter an order maintaining jurisdiction over this action and setting a status conference in this matter, and providing for the conduct of a hearing as required by Part V, B and C of the Consent Decree, and preserving all privileges, obligations and rights of the parties.

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

ORDER

The United States, plaintiff, having requested that this Court enter an order maintaining jurisdiction over this litigation and enter an order to conduct a hearing for the purpose of determining whether defendants have fully implemented all provisions of the 1981 Consent Decree and the 1982 Addendum to Consent Decree and are operating the system of public higher education on a unitary basis, and to assign a date for a status conference for the purpose of setting a hearing date, the same is, for good cause shown, GRANTED.

THEREFORE, jurisdiction over this litigation is maintained, a status conference is hereby set for Monday, February 29, 1988 at 4:45 P.M. to determine a date for the conduct of a hearing for the purpose of determining whether defendants have fully implemented all provisions of the 1981 Consent Decree and the 1982 Addendum to Consent Decree and are operating the system of public higher education on a unitary basis, such hearing date to be set in this matter pursuant to further orders of the

court, and all privileges, obligations, and rights of the parties are hereby preserved.

New Orleans, Louisiana, December 29, 1987.

/s/ Charles Schwartz, Jr.
United States District Judge
Individually and for
and on behalf of
Judge John Minor Wisdom
and
Judge Veronica D. Wicker

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing United States' Motion for Hearing and Memorandum in Support of Motion for Hearing upon the following counsel by transmitting a copy by first class mail, postage prepaid, addressed as follows:

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This the 29th day of December, 1987.

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/s/ William F. Baity
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

MOTION OF THE UNITED STATES FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

The United States, plaintiff herein, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure and Local Rule 3.9 respectfully moves this Court for entry of an order granting summary judgment in its favor.

This motion for summary judgment is based on and supported by the pleadings, depositions, answers to interrogatories, responses to requests for admissions, responses to requests for production, the United States' Pre-Trial Brief, Defendants' Pre-Trial Brief, the United States' Preliminary Pre-Trial Statement, the Defendants' Responses to the United States' Pre-Trial Statement, affidavits filed herewith, Stipulations, Defendants' Consent Decree Monitoring Committee Reports, and the record filed herein. As more fully detailed in the accompanying Memorandum In Support of Motion for Summary Judgment, these documents show that there is no genuine issue as to any material fact demonstrating (1) that the defendants continue to operate a system of public higher education institutions which contain vestiges of the State

of Louisiana's as former dual school system segregated on the basis of race in violation of Title VI of the Civil Rights Act of 1964, the 1988 Civil Rights Restoration Act, and applicable case law, and (2) the United States is entitled to judgment on the issue of liability as a matter of law.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

The United States, pursuant to Rule 56 of the Federal Rules of Civil Procedure, submits this memorandum in support of the attached Motion for Summary Judgment.

PROCEDURAL HISTORY

This action was commenced on March 14, 1974 by the Attorney General on behalf of the United States to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (hereinafter referred to as Title VI). This Court has jurisdiction under Sections 601 and 602 of Title VI (42 U.S.C. §§ 2000d, 2000d-1), 28 U.S.C. § 1345, and the Civil Rights Restoration Act of 1988. A Three-Judge Court was constituted on March 28, 1974 to hear and determine this action.

The defendants are recipients of substantial federal financial assistance and, in consideration for that assist-

ance, have agreed to comply with Title VI and other applicable federal law. In January 1969, the U.S. Department of Health, Education and Welfare (hereinafter HEW) determined that the defendants were not in compliance with Title VI insofar as they operated a racially dual system of public higher education. As required by Title VI, the regulations issued thereunder, and the United States District Court's orders in *Adams* v. *Richardson*, 356 F.Supp. 92 (D.D.C. 1973), *aff'd* 480 F.2d 1159 (D.C. Cir. 1973), HEW sought between 1969 and 1973 to obtain from the defendants a constitutionally acceptable desegregation plan for the statewide system of public higher education. The defendants refused to submit the requested required plan and, in January 1974, HEW referred the matter to the Attorney General with a recommendation that this action be initiated. Thereafter, the parties entered into a consent decree, approved and entered by this Court on September 8, 1981. The consent decree by its terms was to expire without further order of the Court on December 31, 1987 unless the plaintiff timely filed a motion to seek compliance with the decree or to seek other relief implicating the decree. Such a motion was filed on December 29, 1987.

LEGAL STANDARDS

A. *Summary Judgment Is Appropriate*

The United States has moved, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment concerning the issue of the defendants' liability. Such a motion is appropriate in this case. For instance, in *Davis & United States* v. *East Baton Rouge Parish School Board*, 498 F. Supp. 580 (M.D.La. 1980), *aff'd* 721 F.2d 1425 (5th Cir. 1983), the Court held that it could properly consider a motion for summary judgment on the issue of whether, *inter alia*, vestiges of the former dual school system continued to exist in a school system

which continued to operate schools which served enrollments composed of students of virtually one-race.[1]

Summary judgment permits a party to obtain relief where the facts, as set forth in detail in affidavits, depositions, answers to interrogatories, responses to admission, and production requests on file show that there is no genuine issues of material fact to be tried and that the moving party is entitled to judgment as a matter of law. *Associated Press* v. *United States*, 326 U.S. 1 (1945); *Gauk* v. *Meleski*, 346 F.2d 433 (5th Cir. 1965); Rule 56 Fed. R. Civ. P.; 6 *Moore's Fed. Prac.* 56.04[1]. Summary judgment may be rendered on the issue of liability alone. Rule 56(c), Fed. R. Civ. P.[2] The purpose of a motion for summary judgment is to test the intrinsic merits of the case and to determine prior to trial whether the parties have a real basis for relief or defense. *Gossett* v. *Du-Ra-Kel Corp.*, 569 F.2d 869, 871 (5th Cir. 1978).[3]

In order to prevail on a summary judgment motion, the burden is on the moving party to establish the facts necessary to compel the legal result and to prove that such facts are not in genuine dispute. *Davis, supra; Irwin* v. *United States*, 558 F.2d 249, 252 (5th Cir. 1977).[4] The material facts presented by the United

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[1] See also *Barrett* v. *Craven County Board of Education*, 70 F.R.D. 466 (E.D.N.C. 1976); *United States* v. *Mississippi*, Civil Action No. 4706 (S.D. Miss. 1980) (unreported).

[2] Reference should also be made to Rules 42(b) and 56(d), Fed. R. Civ. P. See also *Rachal* v. *Hill*, 435 F.2d 59, 65 (5th Cir. 1970), *cert. den.*, 403 U.S. 904 (1971).

[3] See also *United States* v. *Harrison County School District*, C.A. No. 4706 (S.D. Miss. 1980) (Order attached).

[4] Summary judgment procedures does place some obligations on the nonmoving party and does not permit that party to rest on his pleadings or on the plea that he may bring forth opposing facts through further discovery or trial. *Gossett, supra*; see also *Celotex Corp.* v. *Catrett*, 54 U.S.L.W. 4775 (U.S. June 25, 1985); *Anderson*

States are not in genuine dispute. Acordingly, summary judgment should be granted if, as a matter of law, those facts establish defendants' liability. The United States submits that the facts do so establish.

B. Defendants' Current Operation Of Its Public Higher Education System Violates Applicable Federal Law

There is no dispute that the State of Louisiana has an affirmative duty to remove the vestiges of its dual system of higher education. *Swann* v. *Charlotte-Mecklenburg*, 402 U.S. 1 (1971); *Milliken* v. *Bradley*, 433 U.S. 267 (1977). It is the State's failure to comply with that obligation that is the esence of the government's legal claim. Admissions at institutions of higher education are largely determined by the voluntary choice of private individuals. In remedying its constitutional violation, the State is not required either to alter fundamentally the nature of its program by eliminating or restricting individuals' free choice or to achieve some specific degree of racial balance. *Bazemore* v. *Friday*, 478 U.S. —— (1986). At the same time, that "free choice" must be truly *free* unfettered by present conditions which stem from the prior dual system. Defendants have failed to implement the terms of the 1981 Consent Decree, and accordingly have failed to create such an unfettered system.

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v. *Liberty Lobby, Inc.*, 54 U.S.L.W. 4755 (U.S. June 25, 1986); *Matsushita Elec. Ind. Co.* v. *Zenith Radio Co.*, 475 U.S. 579 (1986). Indeed Rule 56(e) explicitly states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of his pleadings, but his response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

1. Under the dual system, traditionally black colleges in Louisiana were not only separate, but unequal, suffering disparities in faculty, funding, facilties, and course offerings. These continuing educational inequalities, clearly traceable to the dual system, discourage the enrollment of white students at the traditionally black institutions. For that reason, the State's duty is not met by simply instituting a non-discriminatory admissions policy. To remove the effects of the prior discriminatory system, the state must correct the conditions which continue to foster segregation. *Swann, supra; Milliken, supra; Sanders* v. *Ellington*, 288 F.Supp. 937 (M.D. Tenn. 1968). It may accomplish that end either by correcting the educational disparities at the traditionally black institutions or by taking other steps to ensure that the conditions at those institutions do not operate to discourage attendance by white students. *Sanders* v. *Ellington, supra.* Thus, the duty of the State is to provide the traditionally black institutions a realistic chance of attracting white students. Moreover, until a unitary system is achieved, the defendants are required to refrain from any actions, such as location of institutions or course offerings, which serve to perpetuate the dual system, even where those actions are taken without discriminatory intent. *Columbus Board of Educaton* v. *Penick*, 443 U.S. 449, 460 (1978).

The Supreme Court repeatedly has held that the authorities which operated a dual system of education have an affirmative obligation to dismantle that dual system, and in so doing to eliminate as completely as possible the discriminatory vestiges of that system. *Milliken* v. *Bradley*, 433 U.S. 267, 290 (1977). See also *Swann, supra*, 402 U.S. at 15. All federal courts which have addressed the issue have recognized that the affirmative duty to disestablish prior segregation applies at the college level. See *e.g., Geier* v. *University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979); *Norris* v. *State Council of Higher Education*, 327 F. Supp. 1368 (E.D. Va. 1971)

(three judge court), *aff'd sub. nom. Board of Visitors of the College of William and Mary* v. *Norris*, 404 U.S. 907 (1971); *Lee* v. *Macon*, 267 F. Supp. 458 (M.D. Ala.), *aff'd sub nom. Wallace* v. *United States*, 389 U.S. 215 (1967); *Alabama State Teachers Association (ASTA)* v. *Alabama Public School and College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968) (three judge court), *aff'd*, 393 U.S. 400 (1969).

The more difficult question concerns the nature of the affirmative duty and the extent to which it differs from that applicable to elementary and secondary education. Specifically, the fundamental question is whether a higher education system that retains a "free choice" admission system that does not produce a degree of racial balance or integration at formally segregated schools has, on that basis, failed to fulfill its remedial duty.

2. Where, as in higher education, admissions are normally determined by the voluntary choice of private actors, a State need not either restrict any person's equal access to the program of his or her choice or achieve any specific degree of racial balance in order to cure prior segregation. In *Bazemore*, the Supreme Court held that the North Carolina Agricultural Extension Service had "disestablish[ed] segregation in its [4-H and Homemaker] Clubs", notwithstanding the fact that there remained "a great many all-white and all-black clubs" and that all club members were entirely free to choose the club they wished to join, 54 U.S.L.W. at 4977. *Bazemore* drew an explicit distinction between elementary and secondary education and those systems where admissions are traditionally determined by voluntary choice and held that, at least with respect to the latter situation, the affirmative duty to desegregate does not entail either restricting such choice or achieving any degree of racial balance.

We believe, therefore, that *Bazemore* applies to the higher education context, but its lesson is obviously not that the elimination of segregation and its effects is re-

quired only in local schools, but that the means of effectuating this affirmative duty necessarily differs depending upon the degree of control the relevant public entity normally exercises over the admission and attendance patterns of private participants. In all instances, the ultimate constitutional requirement is to take affirmative action to create a system that it is free from any devices which subtly exclude or separate the races. The degree of control, in turn, dictates both the remedial action the governmental entity must undertake to undo the effects of past discrimination and the legitimacy of allowing private actors to determine where they will participate in a government program.

In short, *Bazemore* simply applied the familiar principle that effective desegregation does not require any degree of racial balance but only the elimination of those lingering conditions within the State's control that impede such integration. See *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 413 (1977); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 433-434 (1976); *Milliken* v. *Bradley*, 418 U.S. 717, -740-741 (1974); *Swann* v. *Board of Education*, 402 U.S. 1, 24 (1971).

3. In the higher education context, if cannot be plausibly maintained that the only component of a formally segregated system which needs to be cleansed of all racial considerations is the respective colleges' actual admission practices. There are other aspects of a university system which directly influence the enrollment choices of students, including, most notably, the type and quality of educational benefits offered at formerly black institutions. A higher education system must take affimative action to ensure that the aspects of that system do not impede desegregation. This action is necessary to make certain that all existing conditions within the State's control do not contribute to segregation, thus ensuring that any racial imbalance that exists is truly

the product of unfettered private choice. The defendants are required to ensure that components of the higher education system that affect admissions do not serve to induce or foster segregation. Inequalities in a system of higher education, which are directly attributable to unlawful segregation, continue to influence negatively choices long after the racial limitations are removed.[5] Where lingering disparities in faculty, funding, facilities and course offerings which discourage other-race enrollment remain, an "open door" admission policy will not satisfy the state's duty to remove the effects of those disparities on the segregation of the schools. That can be accomplished only by removing the disparities or taking other steps to ensure that the condition of traditionally black schools does not act to discourage white attendance. Thus, the duty of the State is to provide the black schools a realistic chance of attracting white students. See *e.g.*, *Sanders* v. *Ellington*, *supra*, 1288 F. Supp. at 943 ("black school must be made attractive to students who will exercise a free choice as to where they attend a college"); *Hunnicut* v. *Burges*, 356 F. Supp. 1227 (M.D. Ga. 1973) (state required to remedy academic and physical deficiencies at black schools that were traceable to the historic dual system and instrumental in the school's retention of its identification as a school appropriate only for blacks).[6]

Acordingly, the duty to eliminate the vestiges of discrimination requires the State to establish a system that "excludes no student * * *, directly *or indirectly*, on account of race." *Swann*, *supra* at 23 (emphasis added).

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[5] As the Supreme Court stated in *Milliken*, *supra*, "Discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination. Federal courts need not, and cannot, close their eyes to inequalities, shown by the record, which flow from a long-standing segregated system."

[6] See also *Lee* v. *Macon*, 453 F.2d 524, 527 (5th Cir. 1971).

This requires the State to address educational deficiencies at traditionally black schools which are vestiges of the dual system and hinder the school's ability to attract white students.

They have not implemented the terms of the 1981 Consent Decree and are not operating their system of higher education on a unitary basis.

The United States submits that the List of Material Facts to the Motion for Summary Judgment, filed with this motion, clearly establish that defendants have not dismantled their dual system.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

LIST OF MATERIAL FACTS TO THE MOTION FOR SUMMARY JUDGMENT

The United States, plaintiff herein, pursuant to Local Rule 3.9 submits its list of material facts to the motion for summary judgment. The United States contends that there is no genuine issue of liability in this case.

The pleadings, depositions, answers to interrogatories, responses to requests for admission, production requests, the United States' Pre-Trial Brief and Defendants' Responses thereto, the Consent Decree Monitoring Committee Reports, and the record establish beyond peradventure the following material facts which demonstrate that the defendants currently operate a public higher education system which contains vestiges of the State's prior *de jure* segregated public higher education system in violation of applicable federal law.

MATERIAL FACTS

1. Title VI provides that "[n]o persons in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

program or activity receiving federal financial assistance." (Defendants' Responses to Plaintiff's Pre-trial Brief No. 1).

2. All of Louisiana's public institutions of higher education were the recipients of federal financial assistance, and they have continued to receive federal funds up to the present time. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 2).

3. As recipients of federal financial assistance all of Lousiana's public institutions of higher education have agreed to comply with Title VI of the Civil Rights Act of 1964 and with all regulations issued pursuant to Title VI. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 2.02).

4. On January 13, 1969, HEW notified the State of Louisiana that the compliance reviews conducted in 1968 revealed that Louisiana's public institutions of higher education were not in compliance with Title VI.[1] (Defendants' Responses to Plaintiff's Pre-trial Brief No. 3.00-3.07).

5. The State did not submit a desegregation plan as requested by HEW in its January 13th letter. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 3.13).

6. On March 27, 1973 HEW informed the LSU Board of Supervisors, the State Board of Education and the Louisiana Coordinating Council of the February 16, 1973 order entered in *Adams* v. *Richardson* requiring HEW to secure a desegregation plan from Louisiana and nine other states within 120 days or commence enforcement action against states which failed to submit an acceptable plan. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 3.23).

7. In the March 27, 1973 letter HEW requested, *inter alia*, that appropriate state officials take steps to develop

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[1] HEW refers to the former Department of Health, Education and Welfare, which is now the Department of Education.

a plan in compliance with the order entered in the *Adams* case. (Defendants' Response to Plaintiff's Pre-trial Brief No. 3.24).

8. The State did not submit a or plan as requested in HEW's November 10th letter. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 3.36).

9. On January 11, 1974, HEW requested that the Attorney General initiate enforcement action against the State of Louisiana in order to bring the State's systems of higher education into compliance with Title VI. (Stipulations Nos. 82 & 83).

10. This action was filed by the Attorney General on behalf of the United States on March 14, 1974. (United States' complaint).

11. The original defendants were: the Louisiana State Board of Education; the Louisiana Coordinating Council for Higher Education; the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College; and the individual members of each of the aforementioned boards. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 5.02).

12. As a result of changes in the Louisiana Constitution of 1974, new defendants were substituted for certain defendants named in the original complaint. (Defendant's Responses to Plaintiff's Pre-trial Brief No. 5.05).

13. Each of Louisiana's public colleges and universities established prior to 1954 was established by the State to serve only blacks or only whites. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 6.00-7.01; Defendants' Response and Amended Response to Plaintiff's First Request for Admissions Nos. 14-21, 24, 25, 55, 71)).

14. As a result of changes in the Louisiana Constitution of 1974, new defendants were substituted for certain defendants named in the original complaint.

(a) the State Louisiana, and the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College remained as defendants;

(b) the newly established Board of Supervisors of Southern University and Agricultural and Mechanical College, Board of Trustees for State Colleges and Universities, and Board of Regents were added as defendants. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 5.05).

15. In order to preserve the all-white character of graduate and professional programs operated by the State, Louisiana denied qualified black students admission to these programs and instead provided scholarships which such students could use only at institutions in other states. (Defendants' Responses to Plantiff's Pretrial Brief Nos. 8.00-8.02, 8.04-8.06; Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 22 & 23,).

16. Prior to the *Brown* decision in May 1954, a number of injunctions were issued by federal district courts enjoining state institutions from refusing to admit black citizens. (Defendants' Responses to Plaintiff's Pre-trial Brief Nos. 9.01-9.05; Defendants' Responses and Amended Responses to Plaintiff's First Request for Admissions Nos. 26-35).

17. In 1953, the federal district court ordered that the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College was enjoined from denying admission to Alexander T. Tureaud. [*Tureaud* v. *Board of Supervisors, etc.* 116 F. Supp. 248 (E.D. La. 1953), reversed, 207 F.2d 807 (5th Cir. 1953), vacated and remanded per curiam, 347 U.S.971 (1954)]. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions No. 34).

18. As of September 8, 1953, the Constitution and laws of the State of Louisiana required the segregation of

white and Negro races, and the State and its agencies excluded Negroes from schools reserved for whites and vice versa. [*Return and Answer of Defendants to Notice of Application for a Preliminary Injunction* in *Tureaud* v. *Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, C.A. No. 1238, United States District Court for the Eastern District of Louisiana, Baton Rouge Division, Second Defense p. 4], (Defendants' Response and Amended Responses to Plaintiff's First Request for Admission No. 35).

19. In 1955, the federal district court issued an order enjoining the Louisiana State Board of Education from denying admission to Thomas C. Wells, Janette H. Jordan, Margaret Jones, Norma Love, Mildred Crawford, Mrs. Alma M. Lark, Louise Jones, Myrtle Cook, Willie Jackson, Bettye Jean Lewis, Mary Lann Love, Doris Jennings, and other Negroes similarly situated and qualified, to Southwestern Louisiana College. (*Wells* v. *Dyson*, Civil Action No. 4689, (Eastern District of Louisiana, New Orleans Division, Order issued April 25, 1955)]. (Defendants' Response and Amended Reponses to Plaintiff's First Request for Admissions No. 41).

20. In 1954, a Joint Legislative Committee of the Louisiana State Senate and House of Representatives was established to provide ways and means to preserve the existing social order of the State of Louisiana in view of the Supreme Court's decision in the school desegregation cases. [Louisiana Acts of 1954, H.C.R. Nos. 22 and 27]. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions No. 42).

21. On September 13, 1958, the Board of Supervisors for Louisiana State University and Agricultural and Mechanical College unanimously adopted the following resolution:

> WHEREAS, the official policy of the State of Louisiana, as repeatedly proclaimed by the Legisla-

ture of Louisiana and the executive official of the State, is that the traditional separation of the white and negro races be maintained and strengthened, especially in the field of education; and

WHEREAS, Louisiana State University has, in several cases, been ordered by Federal Courts to admit negro applicants to certain courses, branches or divisions of the University; and the University is, at this time, a defendant in additional litigation seeking to force the entry of negro applicants into other branches of the University.

THEREFORE, BE IT RESOLVED by the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College that it is now reiterated, reaffirmed and again pronounced that the official policy of the University and of this Board is that University continue to be operated strictly in accordance with the long established custom of not willingly admitting negro applicants, all in accordance with the official policy of the State of Louisiana, and that the University will enroll only those negroes whose admission is finally compelled by reason of a valid injunction or court order issued by a court of competent jurisdiction.

BE IT FURTHER RESOLVED that in the interest of higher education in the State of Louisiana, and especially, at this University, this Board wishes to point out that any negro student whose enrollment is forced upon this University enters as an unwanted matriculant; that his continued presence will serve as a symbol of defiance of the traditions and customs of this University * * * and that consequently it is the official policy of this University that all negro applicants would be well advised to attend Southern University, its branch in New Orleans, of one of the other fine institutions specifically

provided for members of their race by the taxpayers of the State of Louisiana.

[Minutes of Special Board Meeting of the L.S.U. & A.&M. College Board of Supervisors, September 13, 1958]. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions No. 55).

22. After the *Brown* decision, the State enacted a series of statutes which required the separation of the races in public higher education. (Defendants' Responses to Plaintiff's Pretrial Brief Nos. 11.01-11.03, 11.08-11.16; Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 38, 39, 42-46, 49-52, 58-62).

23. After the *Brown* decision, state institutions continued to refuse to admit qualified black applicants and blacks were admitted to state institutions only pursuant to federal court injunctions. (Defendants' Responses to Plaintiff's Pre-trial Brief Nos. 12.01-12.11; Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 36, 37, 40, 41, 53-55, 63-71, 75-80).

24. In 1958, the federal district court issued an order enjoining the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College from refusing to admit Jamesetta Henley, Wilson Fleming Jr., Louis Radcliff, Janice Elaine Coleman, Evelyn Mae Gaskin, Daniel J. Lewis, III, Philip Joseph Mitchell, Jr., Gwendolyn Agnes Norman, Geraldine Sholes, Ernestine M. Lyons, Rosalee McKinley, and other Negro citizens of the State of Louisiana similarly qualified and situated, to the Undergraduate School of Louisiana State University in New Orleans. [*Fleming* v. *Board of Supervisors*, Civil Action No. 2105, United States District Court for the Eastern District of Louisiana, Baton Rouge Division, order issued on September 9, 1958, *aff'd*,

265 F.2d 736 (5th Cir. 1959)] (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 54).

25. On or about September 4, 1963, Edward Baker, Louise Mae Jones, Lynn J. Rounds, Samuel Louis Ellis, Sandra Ann Hawkins, Rudolph Parker, Julia Ann Robertson, Lois Young and Doris Young, all of whom were black citizens of the State of Louisiana and who were otherwise qualified for admission to Nicholls State College, were denied admission to said school solely on the basis of their race or color in compliance with regulations established by the Legislature of Louisiana. [*Answer and Defenses* in *Baker* v. *State Board of Education* Civil Action No. 13,824, United States District Court for the Eastern District of Louisiana, New Orleans Division, Fourth Defense, paras. V & VI]. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 63).

26. After 1954, the State continued to establish institutions of higher learning to serve whites only and separate institutions to serve blacks only. (Defendants' Responses to Plaintiff's Pre-trial Brief Nos. 13.01-13.05, 13.08-13.09; Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions No. 48).

27. On June 26, 1956, Louisiana State University and Agricultural and Mechanical College in New Orleans (now University of New Orleans) was established by state law. (Louisiana Acts of 1956, No. 60]. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 47).

28. On September 6, 1956, "a Negro College in the Greater New Orleans Metropolitan area" (now Southern University New Orleans) was established by state law as a branch or extension of Southern University. [Louisiana Acts of 1956 (Extraordinary Session), No,. 28].

(Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 48).

29. Until 1968, official state publications identified public institutions of higher learning by race. (Defendants' Response and Amended Responses to Plaintiff's Pre-trial Brief Nos. 14.01-14.05; Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 71; Stipulation Nos. 85-87).

30. In the Master Plan of 1972, the Coordinating Council recognized that Louisiana had a tradition of separate facilities for blacks and whites. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 18.02).

31. The Master Plan of 1978 did not address the recommendations contained in the Master Plan of 1972 concerning the establishment of unitary systems of public higher education. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 19.06).

32. The Louisiana Board of Regents' 1980 Progress Report fails to address the disestablishment of the state-imposed racially dual system of higher education and/or the elimination of vestiges of that system. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 20.01).

33. Public institutions of higher education historically have been governed by boards whose membership was racially segregated; at present, the racial compositions of governing boards and their staffs excluding the Board for State Colleges and Universities reflect patterns and vestiges of segregation. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 27.00; Defendants' Consent Decree Monitoring Committee Report for 1987, Appendix A).

34. Each of the current members of the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College has been appointed or reappointed by the Governor of the State of Louisiana with

the consent of the Senate on or after June 4, 1982. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 27.06; Defendants' Consent Decree Monitoring Committee Reports, Appendix A).

35. Of the seventeen voting members currently sitting on the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, thirteen are white and four are black. 1987 Consent Decree Monitoring Committee, Report Appendix A Tables 3).

36. Between 1922 and 1975, all Louisiana public institutions of higher education except those in the Louisiana State University System were operated by the State Board of Education, thus management authority over institutions of higher education was vested in two boards. (Defendant's Response and Amended Responses to Plaintiff's First Request for Admissions No. 4).

37. The State Board of Education, from its establishment in 1922 to its dissolution at the end of 1974, never had a black member. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 27.17).

38. Pursuant to Article VIII, Section 5 of the Louisiana Constitution of 1974, statewide responsibility for planning and coordinating public higher education in the State of Louisiana is vested in the Louisiana Board of Regents. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 1 and 2).

39. Pursuant to the Louisiana Constitution of 1974, public institutions of higher education in Louisiana are divided into three separate systems: the Louisiana State University and Agricultural and Mechanical College System; the Southern University and Agricultural and Mechanical College System; and the State Colleges and Universities System. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions No. 3).

40. Powers of management over public institutions of higher education in Louisiana, which are not specifically vested in the Board of Regents by the Louisiana Constitution of 1974, are reserved to three management boards: the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical College, and the Board of Trustees for State Colleges and Universities. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 6-9).

41. Under the Louisiana Constitution of 1974, higher education institutions formerly under the authority of the State Board of Education were placed under the authority of two boards: the Board of Supervisors of Southern University and Agricultural and Mechanical College, and the Board of Trustees for State Colleges and Universities; this change became effective on January 1, 1975. (Defendants' Responses to Plaintiff's Pretrial Brief No. 27.21; Defendant's Response and Amended Responses to Plaintiff's First Request for Admissions No. 5).

42. The Board of Trustees for State Colleges and Universities, the Board of Supervisors of Southern University and Agricultural and Mechanical Colleges, and the Louisiana Board of Elementary and Secondary Education are the legal successors to the Louisiana State Board of Education. (Defendants' Responses to Plaintiff's Pretrial Brief No. 27.23).

43. The Louisiana State University System consists of the following institutions: Louisiana State University at Alexandria Louisiana State University at Baton Rouge; Louisiana State University at Eunice; Louisiana State University at Shreveport; Louisiana State University Medical Center; and the University of New Orleans. (Defendants' Response and Amended Responses to Plain-

tiff's First Requests for Admissions No. 10; Consent Decree Monitoring Committee Reports, Appendix A).

44. Under the Louisiana Constitution of 1974, institutions formerly under the authority of the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College remained under that authority. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 27.24).

45. The Southern University System consists of the following institutions: Southern University at Baton Rouge; Southern University at Shreveport-Bossier City; and Southern University at New Orleans. (Defendants' Response and Amended Responses to Plaintiff's First Requests for Admissions No. 11).

46. All members of the Board of Supervisors of Southern University have been appointed by the Governor with the consent of the State Senate on or after March 1983. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 27.26; 1987 Consent Decree Monitoring Committee Report, Appendix A).

47. There are seventeen voting members on the Board of Supervisors of Southern University and Agricultural and Mechanical College. (1987 Consent Decree Monitoring Committee, Report Appendix A, Table 4).

48. Of the seventeen voting members currently sitting on the Board of Supervisors of Southern University and Agricultural and Mechanical College, thirteen are black and four are white. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 4).

49. The State Colleges and Universities System consists of the following institutions: Delgado Junior College, Grambling State University, Louisiana Tech University, McNeese State University, Nicholls State University, Northeast Louisiana University, Northwestern State University, Southeastern Louisiana University and

the University of Southwestern Louisiana. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions No. 12).

50. The Louisiana Board of Regents is the legal successor to the Louisiana Coordinating Council for Higher Education. (Defendants' Responses to Plaintiff's Pretrial Brief Nos. 27.36-27.38).

51. All members of the Board of Regents have been appointed by the Governor. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 27.43).

52. There are fifteen members of the Louisiana Board of Regents; twelve of whom are white and three are black. (1987 Consent Decree Monitoring Committee Report, Appendix A Table 1).

53. Since January 1, 1975, public institutions of higher education have operated under the supervision of four governing or managing boards: the Louisiana Board of Regents, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Trustees for State Colleges and Universities. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 27.46; Defendants' Response and Amended Responses to Plaintiff's First Request for Admission Nos. 6-9).

54. In academic year 1968-69, Louisiana State University operated the only public medical and dental schools in the State. (Defendants' Response to Plaintiff's Pre-trial Brief No. 29.07).

55. Between academic years 1954-55 and 1968-69, the State of Louisiana sent many black students to study medicine and dentistry at Meharry Medical College in Tennessee under an out-of-state scholarship program. (Defendants' Responses to Plaintiff's Pre-trial Brief Nos. 29.08-29.09).

56. In academic year 1974-75, three of 358 students (0.8 percent) enrolled in Louisiana State University's

dentistry program were black (Defendants' Responses to Plaintiff's Pre-trial Brief No. 30.08).

57. In academic year 1974-75, the State of Louisiana paid tuition to Meharry Medical College in Tennessee for six dental students from Louisiana, all of whom were black. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 30.09).

58. In academic year 1974-75, two of 156 medical students (1.2 percent) enrolled at the Shreveport campus of Louisiana State University Medical Center were black. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 30.10).

59. In academic year 1974-75, the State of Louisiana paid tuition to Meharry Medical College in Tennessee for 14 medical students from Louisiana, all of whom were black. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 30.11).

60. In every year from 1969-70 to 1974-75 the State of Louisiana and its agents took affirmative steps which preserved and enhanced the racial identifiability of professional program at Louisiana public institutions of higher education, and which impeded the desegregation of such programs. (Defendants' Responses to Plaintiff's Pre-trial Brief Nos. 30.12-30.13).

61. In academic year 1980-81, Louisiana State University Veterinary School enrolled 312 professional students, 311 (99.7 percent) of whom were white and one (0.3 percent) of whom was black. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 31.14).

62. In academic year 1980-81, four of 358 students (1.1 percent) enrolled in the dentistry program at Louisiana State University Medical Center were black; this compares with three black students (0.8 percent) out of 358 six years earlier. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 31.16).

63. In academic year 1980-81, the State of Louisiana paid tuition to Meharry Medical Center in Tennessee for six dental students from Louisiana, 100.0 percent of whom were black. (Defendants' Responses to Plaintiff's Pre-trial Brief No. 31.17).

64. In the years since the *Brown* decision, Louisiana and its agents have failed to eliminate the racial identifiability of professional programs at the Louisiana State University Medical Center. (Defendants' Consent Decree Monitoring Committee Reports, Appendices A).

65. Between academic years 1980-81 and 1987-88, the State of Louisiana operated one identifiably white law school and one identifiably black law school in Baton Rouge. (Defendants' Consent Decree Monitoring Committee Reports).

66. Between academic years 1980-81 and 1987-88, enrollment patterns at proximate pairs of institutions reflected patterns and vestiges of the former dual system. (Defendants' Consent Decree Monitoring Committee Reports—Appendix A).

67. An examination of defendants' institutions' faculties, staff and administrators reveals vestiges of the state-imposed dual system of higher education. (Defendants' Responses to Plaintiff's Pre-trial Brief Nos. 43.01-44.00, 44.02, 44.04-44.12, 44.14, 4501-49.01, 49.03-49.05, 50.01, 50.50-50.13; Defendants' Consent Decree Monitoring Committee Reports).

68. Prior to 1954, the State of Louisiana established a dual system of agricultural and mechanical colleges by desgnating two land grant colleges, one for whites and one for blacks. (Defendants' Responses to Plaintiff's Pre-trial Brief Nos. 77.01-77.05, 77.07-77.08, 78.08, 78.10, 78.12, 78.16).

69. Since 1954 the selection of chief executive of the public colleges and universities in Louisiana has contin-

ued to reflect the historic racial character of the institutions they were selected to administer. (Defendants' Response and Amended Responses to Plaintiff's First Request for Admissions Nos. 101 and 102).

STUDENT ENROLLMENT

70. As of the 1986-87 school year, the undergraduate student enrollments of the historically black institutions, Southern University[2] and Grambling State University, continue to reflect the race of the clientele for which the respective institutions were established to serve. (1987 Consent Decree Monitoring Committee Report, Appendix A, Tables 6, 7).

71. As of the 1986-87 school year, the undergraduate enrollments of the historically white institutions (collectively) continue to reflect the race of the clientele for which the institutions were established to serve.[3] (1987 Consent Decree Monitoring Committee Report, Appendix A, Tables 6, 7).

72. Several of the historically white institutions[4] enrolled fewer other-race students during the 1986-87 school year than they did in 1980. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 7).

73. As of the 1986-87 school year, the least amount of progress in other race undergraduate student enrollment was experienced by two of the larger institutions/campuses, LSU-Baton Rouge and LSU-Alexandria. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 7).

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[2] SUNO aided by the cross-registration program has made substantial progress in establishing an other race presence on the campus.

[3] Several institutions have made significant progress in the area of other-race student enrollment, i.e., Louisiana Tech, McNeese, Northwestern, Southwestern.

[4] Delgado, Nicholls, Northeast, Southeastern, LSU-Eunice.

74. As of the 1986-87 school year, two of the three historically black institutions/campuses offering graduate/professional programs have made substantial progress toward other race student enrollment. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 8).

75. As of the 1986-87 school year, vis-a-vis 1980, none of the historically white institutions offering graduate/professional programs have made significant progress in increasing other race student enrollment.[5] (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 8).

76. As of the 1986-87 school year vis-a-vis 1980, several of the historically white institutions offering graduate education programs have incurred substantial decreases in their respective other-race enrollment.[6] (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 8).

77. As of the 1986-87 school year none of the professional schools[7] operated by Louisiana State University have made substantial progress in increasing their other-race enrollment. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 8).

78. As of the 1986-87 school year vis-a-vis 1980, the L.S.U.-Law Center has incurred a substantial decrease in other-race enrollment. Thus, the student enrollment continues to reflect the race of the student body it was established to serve. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 8).

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[5] LSU-Baton Rouge and Louisiana Tech have each increased their other race enrollment 0.1 of 1 percent.

[6] Nicholls, Northeast, Southeastern, Southwestern, UNO.

[7] LSU-Dentistry, LSU-Veterinary Medicine, LSU-Medical Center (N.O.), LSU-Medical Center (Shreveport), LSU-Law Center.

EMPLOYMENT

79. The other-race employment statistics by institution, and EEO categories for years 1981-1987, Table 11, 1987 Consent Decree Monitoring Committee Report demonstrates that the traditionally white institutions continue to identified by the racial composition of its faculty and its executive, administrative, and managerial staffs. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 11).

80. During 1981 percentage of other-race executive, administrative, and managerial categories at the traditionally white institutions ranged from 0.0% to 16.2%. By 1986, the other-race percentages ranged from 0.0% to 29.8%.[8] (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 11).

81. During the 1981 and 1986 at the traditionally black institutions, the percentage of other race executive, administrative, and managerial staffs ranged from 0.0% to 1.7% in 1981. In 1987 the other-race percentage was 0.0%. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 11).

82. Relative to full-time faculty positions, during 1981, the percentage of other race faculty at the traditionally white institutions ranged from 0.0% to 10.5%. By 1986, the percentage of other race faculty ranged from 1.4% to 10.2%. Contrast, in 1981, the other race full time faculty at traditionally black institutions ranged from 8% to 23% and in 1986 from 15.0% to 27.8%. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 11).

ACADEMIC PROGRAMS

83. Consequently, the faculty and executive, administrative and managerial staffs at both traditionally white

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[8] The other-race percentages for all traditionally white institutions except Delgado ranged in 1981 from 0.0% to 7.7%; and in 1986 from 0.0% to 10.3% for executive, administrative and managerial staffs.

and black institution continue to reflect their historical racial identification. (1987 Consent Decree Monitoring Committee Report, Appendix A, Table 11).

84. The traditionally black institutions have not developed in terms of their program offerings at a level substantially equal to the traditionally white institutions. (Conrad Depo. at page 266 lines 3 to 8 and page 267 lines 11 to 21).

85. Both Louisiana State University and Southern University were established by statute to become comprehensive institutions.

86. Under the dual system LSU was established to offer comprehensive educational opportunities to whites and Southern was established to offer similar educational opportunities to blacks.

87. Louisiana State University and A&M College was established to provide "general instruction and education in all departments of literature, science, art . . . and it shall provide special instruction for the purpose of agriculture, the mechanical arts, mining, military science and art, civil engineering, law, medicine, commerce, and navgation." (Defendants' Responses to Plaintiff's Pre-trial Brief No. 72.04).

88. The Louisiana statutes creating Southern University provided that Southern University would establish departments of law and medicine and "grant all degrees appertaining to letters and arts known of universities and colleges in Europe and America." (Attachment 1, 1880 La. Acts No. 87, Sec. 7).

89. Louisiana State University became a lang grant institution pursuant to the Morrill Act of 1862. (Defendants' Response to Plaintiff's Pre-trial Brief No. 72.06).

90. Southern University was designated as a land grant institution pursuant to the Morrill Act of 1890.

(Attachment 2 Stipulation Number 131 [The Master Plan for Higher Education in Louisiana, April 20, 1978, Vol. 4, page 143]).

91. Louisiana State University awarded its first graduate degree in 1869. (Defendants' Response to Plaintiff's Pre-trial Brief No. 72.08).

92. Southern University was not authorized to offer graduate degrees until 1957. (Defendants' Response to Plaintiff's Pre-trial Brief No. 72.09).

93. Louisiana State University awarded its first doctoral degree in 1935. (Defendants' Response to Plaintiff's Pre-trial Brief No. 72.10).

94. Southern University by 1981 had not been authorized to offer the doctoral degree. (Defendants' Response to Plaintiff's Pre-trial Brief No. 72.11).

95. In 1981 Southern University was the only state institution established prior to 1900 which had never offered the doctoral degree. (Defendants' Response to Plaintiff's Pre-trial Brief No. 72.12).

96. In 1955, Southern University offered undergraduate degrees in 11 major fields, no graduate degrees, and one professional degree, in law. (Conrad Depo. Report Exhibit pages 15 and 16).

97. In 1955, Louisiana State University, the only state institution authorized to grant graduate degrees, offered undergraduate degrees in 20 major fields of study, and professional degrees in law and medicine. (Conrad Depo. Report Exhibit pages 14 and 16).

98. In 1964, Southern University offered graduate degrees at the masters level in one major field, education. (Conrad Depo. Report Exhibit page 17; Attachment 3: *Coordination and Planning*, Louisiana Higher Education 3, September 1966, pages 124-128).

99. In 1964, Louisiana State University offered masters degrees in 19 major fields and doctoral degrees in

14 major fields. (Attachment 3: *Coordination and Planning*, Louisiana Higher Education 3, September 1966, pages 124-128).

100. In 1980, Southern University-Baton Rouge offered bachelors degrees in 66 disciplines, masters/specialist degrees in 27 disciplines, no doctoral programs, and one professional degree, in law. (Conrad Depo. Report Exhibit page 28, Table 9).

101. In 1980, Louisiana State University-Baton Rouge offered bachelors degrees in 114 disciplines, masters/specialist degrees in 96 disciplines, doctoral programs in 54 disciplines and a professional degree in veterinary medcine. (Conrad Depo. Report Exhibit page 28, Table 9).

102. In 1980, the Louisiana State University System also offered professional degrees in law (Baton Rouge), medicine (New Orleans and Shreveport) and dentistry (New Orleans). (Defendants' Response to Plaintiff's Pre-trial Brief No. 72.19).

103. In 1981 Grambling State University had not developed programmatically to the same extent as Louisiana Tech University or any other traditionally white institution.

104. Louisiana Tech offered its first masters degree program in 1958 and its first doctoral degree program in 1967. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.21).

105. Grambling offered its first master degree program in 1973 and in 1981 had never offered a doctoral degree program. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.22).

106. In 1955, Grambling offered undergraduate degrees in one major field, education. (Conrad Depo. Report Exhibit page 15).

107. In 1955, Louisiana Tech offered undergraduate degrees in 16 major fields. (Conrad Depo. Report Exhibit page 16).

108. In 1964 Grambling offered no graduate degree programs. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.25).

109. In 1964 Louisiana Tech offered masters degree programs in at least 9 major fields. (Attachment 3: *Coordination and Planning*, Louisiana Higher Education 3, September 1966, pages 124-128).

110. In 1980, Grambling offered bachelors degrees in 51 disciplines, master/specialist degrees in 5 disciplines and no doctoral degrees. (Conrad Depo. Report Exhibit page 28, Table 9).

111. In 1980 Louisiana Tech offered bachelors degrees in 86 disciplines, masters/specialist degrees in 36 disciplines and doctoral degree programs in 2 disciplines. (Conrad Depo. Report Exhibit page 28, Table 9).

112. Southern University New Orleans (SUNO) and the University of New Orleans (UNO) were established in 1956 as four year branches of Southern University and Louisiana State University respectively. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.29).

113. UNO offered its first masters program in 1963. (Defendant's Responses to Plaintiff's Pre-Trial Brief 72.30).

114. In 1966, UNO offered masters degree programs in four major fields. (Attachment 3: *Coordination and Planning*, Louisiana Higher Education 3, September 1966, pages 124-128).

115. In 1966, UNO offered its first doctoral program. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.32).

116. In 1981 SUNO had never offered a degree beyond the undergraduate level. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.33).

117. In 1980 SUNO offered bachelor degrees in 32 disciplines, and no graduate degrees. (Conrad Depo. Report Exhibit page 28, Table 9).

118. In 1980 UNO offered bachelor degrees in 52 disciplines, master/specialist degree programs in 27 disciplines and doctoral programs in 9 disciplines. (Conrad Depo. Report Exhibit page 28, Table 9.

119. Southern-Shreveport and LSU-Shreveport were established on the same date in 1964 as two-year extension institutions. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.36).

120. LSU-Shreveport was expanded into a four-year degree granting institution in 1972 and offered its first masters degree program in 1978. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.27).

121. In 1981 Southern-Shreveport continued to be two-year institution offering associate degrees and two-year certificate programs. (Defendants' Responses to Plaintiff's Pre-Trial Brief 72.38).

122. The establishment of unnecessarily duplicative programs at proximate historically black and white institutions has served to perpetuate these institutions as serving predominantly one race. (Conrad Depo. Report Exhibit pages 1, 3 and 5-7).

123. In 1980, approximately eighty-four percent (84%) of the baccalaureate level programs (measured by program option) at Southern University-Baton Rouge were offered as well as Louisiana State University Baton Rouge. (Conrad Depo. Report Exhibit page 7, Table 3).

124. In 1980, approximately eighty-two percent (82%) of the baccalaureate level programs (measured by pro-

gram option) at Southern University New Orleans were offered as well as the University of New Orleans. (Conrad Depo. Report Exhibit page 7, Table 3).

125. In 1980, approximately seventy-five (75%) of the baccalaureate level programs (measured by program option) offered by Grambling State University were offered as well by either Louisiana Tech University or Northeast Louisiana University. (Conrad Depo. Report Exhibit page 7, Table 3).

126. In 1981 none of the Louisiana public higher education governing boards had conducted a study to determine the extent of program duplication at proximate institutions and the effect that program duplication had on student enrollment patterns. (Defendants' Responses to Plaintiff's Pre-Trial Brief 75.00).

127. In 1981 in each proximate area, the range of program offerings (major fields and degree options) available at the traditionally white institution was greater than the range of programs at the traditionally black institution (except at the certificate/associate level in Baton Rouge, New Orleans, and Shreveport and the first professional level in Baton Rouge). (Conrad Depo. Report Exhibit pages 25 and 29, Table 11; Conrad Depo. page 161 line 12 to 21, and page 265 line 3 to page 266 line 8).

128. The existence of proximate black and white state institutions that offered unnecessarily duplicative program offerings has served to perpetuate the state-imposed dual system in Louisiana. (Conrad Depo. page 148 lines 16 to 17; page 161, line 3 to 9; page 196 lines 13 to 21; page 264 lines 10 to 17; and page 265 line 3 to page 266 line 8).

129. Since 1981, the State has made insufficient efforts to enhance the program offerings of the proximate historically black institutions of higher learning in Louisiana.

130. Academic programs initiated at the historically black institutions pursuant to the 1981 Consent Decree and 1982 Addendum to Consent Decree have not developed yet into viable academic programs that are capable of attracting students of all races to these institutions, as required by Part II, Section Seven (B) (4) of the Consent Decree and Section One (A) (1) (c) (4) of the Addendum to Consent Decree. (1982 Annual Report of the CDMC, page 7-4 (reference to Appendix W, page 1); Affidavit of Dr. Clifton Conrad; Affidavits of President Joseph B. Johnson and President Joffre T. Whisenton, 1987 Annual Report of the CDMC, Appendix P, pages 13 to 16, 23, 27 and 29, 30, and 37; Attachment 4 letter from Joseph J. Davies to John R. Thistlethwaite (June 11, 1984) (discussing the Board of Trustees for State Colleges and Universities' concerns regarding the inadequate levels of funding recommended to the state legislature by the Board of Regents for Consent Decree required academic programs at Grambling State University)).

131. The State has not made adequate efforts since 1981 to remedy the deficiencies present in many of the academic programs that were already in existence at the historically black institutions[9] when the 1981 Consent Decree was approved by this Court, as required by Part II, Section Seven (B) of the Consent Decree (Affidavits of President Joffre T. Whisenton and Joseph B. Johnson).

FINANCES

132. At the time of *Brown*, the State of Louisiana funded traditionally black institutions at a lower level than their traditionally white counterparts. (Exhibit Nos. 10, 11, 14 to the April 9 & 10 1981 Depo. of Dr. Leslie, CUBA Reports 1&2 attached to Dr. Leslie's March 23, 1981 Report, Defendants' Responses to Plaintiff's Pre-Trial Brief Nos. 54.01-54.03, 54.10, 54.11).

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[9] Reference here is to Grambling State University, Southern University-Baton Rouge and Southern University-New Orleans.

133. Conclusions regarding the degree to which traditionally black and traditionally white institutions have been funded equally can be drawn from comparative analyses of income and expenditures at the institutions from 1954 to date. (Dr. Leslie's March 23, 1981 Report pg. 1-27; Exhibit No. 2 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

134. Comparisons of income and expenditures between Louisiana State University and Southern University one appropriate and meaningful. (Dr. Leslie's March 23, 1981 Report pg. 5, 11-23, Exhibit No. 2 to April 9 & 10, 1981 Depo. of Dr. Leslie).

135. Between 1953 and 1979, the State/local appropriations per student were greater at Louisiana State University than at Southern University. (Dr. Leslie's March 23, 1981 Report pg. 11-14; Exhibit Nos. 2, 10, 11 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

136. Between 1953 to 1979, the total Education and General Income amounts received by Louisiana State University were greater than that received by Southern University. (Dr. Leslie's March 23, 1981 Report, pg. 15-16; Exhibit Nos. 2, 10, 11 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

137. As of 1981 the relative financial conditions, all other things being equal, are a direct result of historical funding disparities between the two institutions. (Dr. Leslie's March 23, 1981 Report pg. 11-23; Exhibit Nos. 2, 10, 11 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

138. Southern University's ability to satisfy its mission and meet its goals is not only a function of its current funding level but also reflects its historic financial pattern. Thus, the current vestiges of past financial inequities, as of 1981, are present in every aspect of Southern University's institutional life. (Dr. Leslie's March 23, 1981 Report, pg. 20-23; Exhibit No. 2 to the April 9 & 10, 1981 Depo. of Dr. Leslie)

139. As of 1981 the quality and breadth of Southern University, financially vis-a-vis Louisiana State University was in large part directly or indirectly a vestige of the disparate historical funding pattern, and Louisiana State University was simply better off. (Dr. Leslie March 23, 1981 Report pg. 11-23; Exhibit No. 2 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

140. As of 1978, Grambling State University was less viable financially than Louisiana Tech University. (Dr. Leslie March 23, 1981 Report pg. 24-27; Exhibit No. 2 and 14 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

141. Between 1981 to 1987 the Louisiana Board of Regents has repeatedly and consistently recommended larger State appropriations percentage increases for Louisiana State University and the Board of Trustees for Colleges and Universities' institutions, collectively than for Southern University, and Grambling State University. (Affidavit of Dr. Leslie Attachment C, pg. 17).

142. Excluding consent decree funds, actual State/local appropriations per student have been much less at Southern University than at Louisiana State University between 1978-79 to 1985-86. (Affidavit of Dr. Leslie Attachment C pg. 18).

143. Including consent decree funds, actual State/local appropriations per student have been less at Southern University than at Louisiana State University over the period 1978-79 to 1985-86. (Affidavit of Dr. Leslie Attachment C, pg. 18).

144. Between 1981 and 1987 much of Southern University's apparent growth in revenues to the extent there has been real growth, results from tuition increases and increases in student aid resulting largely from an accounting method modification. (Affidavit of Dr. Leslie Attachment C, pg. 18).

145. Between 1980 and 1981 financial equity comparisons, excluding consent decree funds, between Grambling

State University, Louisiana Tech Unversity and the other Board of Trustee institutions, collectively, reveal State/local appropriations increases per student were the lowest at Grambling State University. (Affidavit of Dr. Leslie Attachment C, pg. 18).

146. Between 1981 and 1987, the State funding formula has been changed several times, with the effect being to reduce non-consent decree appropriations for Southern University and Grambling State University. (Affidavit of Dr. Leslie Attachment c, pg. 18).

147. Over the period of 1981 to 1987 the State of Louisiana has substituted consent decree funds *in lieu of* regular appropriations to Southern University and Grambling State University. (Affidavit of Dr. Leslie Attachment C, pg. 11).

148. The Louisiana funding formula, derived from historic costs, tends to perpetuate the *status quo*. To the extent disparities existed prior to implementation of the formula, such disparities have not been and can not be eliminated by the utilization of the formula, alone. (Dr. Leslie's March 23, 1981 Respond pg. 29; Exhibit No. 2 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

149. To the extent that the historically white institutions vis-a-vis the historically black institutions received greater per student funding at the time of implementation of the formula that disparity is perpetuated by the formula. (Dr. Leslie's March 23, 1981 Report, pg. 30-31; Exhibit No. 2 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

150. So long as the historically white institutions vis-a-vis the historically black institutions offer unique higher cost curricula and the formula is not modified to compensate for those curricula, the historical funding disparities will never be fully bridged. (Dr. Leslie's March 23, 1981 Report, pg. 30-34); Exhibit No. 2 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

151. That remnants of the disparate funding treatment received by the predominantly black institutions prior to 1955 continue to exist today. (Dr. Leslie's March 23, 1981 Respond, pg. 30-31; Exhibits No. 2 to the April 9 & 10, 1981 Depo. of Dr. Leslie).

FACILITIES

152. In 1955, with respect to the condition of facilities, there was a wide disparity between proximate white and black institutions; this disparity, and similar disparities between more recently established proximate institutions, continue to the present and reflect vestiges of the dual system. (Dr. Kaiser's June 1981 Report).

153. Under Louisiana State law, authority for the maintenance of higher education facilities has been vested in those boards having responsibility for governing and coordinating public higher education. The legislative appropriates necessary construction funds. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 61.01).

154. In 1938, the authority of the Board of Education relative to facilities was set forth by state law as including: the purchase of all necessary grounds and land; and the purchase, construction, repair, improvement, equipment, and finishing of buildings, facilities, workshops, laboratories and other constrivances needed for the public institutions under the board's control. (Defendants Responses to Plaintiffs Pre-Trial Brief of Facts No. 61. 04).

155. As of 1975, authority for the construction and maintenance of the facilities at the institutions under the Southern University System was vested in the Board of Supervisors of Southern University. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 61.05).

156. As of 1975, authority for the construction and maintenance of the facilities at the institutions under the State Colleges and Universities System was vested in the Board of Trustees for State Colleges and Universities.

(Defendants Responses to Plaintiff's Pre-Trial Brief No. 61.06).

157. As of 1975, the Louisiana Board of Regents has been responsible for reviewing all requests for construction and renovation of facilities at public institutions of higher learning and for making recommendations to the Louisiana Legislature regarding funding for such renovation and construction. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 61.07).

158. The Board of Regents has established Facilites Inspection Teams which are charged with responsibility for inspecting the campuses of each public institution, reporting on the conditions thereof, and reviewing and making recommendations regarding requests for construction and renovation. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 61.08).

159. In 1955, the condition of the facilities at institutions operated for the education of blacks was worse than the condition of facilities at proximate institutions operated for the education of whites. (Dr. Kaiser's June 1981 Report pg. 1-5 1-7).

160. Disparities between traditionally white and traditionally black proximate institutions remain at present. (Dr. Kaiser's June 1981 Report pg. 1-9).

161. Although the condition of facilities at traditionally black institutions has improved since 19[illegible] poor original construction and inadequate maintenance of these facilities have resulted in continued disparities between traditionally black and traditionally white institutions in Lincoln Parish and Baton Rouge with respect to the condition of facilities. (Dr. Kaiser's June, 1981 Report pg. 1-7).

162. Similar disparities exist between newer proximate institutions in Shreveport (LSU-S and SU-S) and New Orleans (UNO and SUNO). (Dr. Kaiser's June 1981 Re-

port pg. 1-6 1-10; Kaiser's Depo. April 7, 1981, pg. 52-56).

163. In 1980, the Louisiana Board of Regents Facilities Inspection Team evaluated the facilities of Southern University-Baton Rouge as being in poor to fair condition. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 64.00).

164. In 1980 as a result of inadequate building modernization programs and inconsistent practices of maintenance, the Southern-Baton Rogue Campus is presently in need of major remodeling and renovation. (Dr. Kaiser's June 1981 Report pg. 1-10).

165. As a result of building deterioration, functional obsolescence of some academic facilities, and in some cases poor selection of materials in original construction, the Southern University-Baton Rouge campus presently requires substantial funds for modernization. (Dr. Kaiser's June 1981 Report pg. 1-10).

166. Extensive funding is needed to improve grounds and utilities at the Southern-Baton Rouge campus. (Dr. Kaiser's June, 1981 Report pg. 1-10).

167. A comparison of facilities at Southern University-Baton Rouge with facilities at non-proximate University of Southwestern Louisiana (USL) shows that the buildings at Southern are generally older and in poorer condition than those on the USL campus. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 64.04).

168. Approximately 18 percent of the academic and administrative facilities at Southern-Baton Rouge are either in poor condition (requiring major remodeling with costs greater than 50 percent of replacement value) or should be demolished. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 64.05).

169. Facilities at Louisiana State University-Baton Rouge are in good condition at the present time. (Dr. Kaiser's June 1981 Report).

170. In 1980, the Louisiana Board of Regents Facilities Inspection Team evaluated the facilities of Louisiana State University-Baton Rouge as follows: "the general physical appearance of the campus was good." (Defendants Responses to Plaintiff's Pre-Trail Brief No. 65.01).

171. In 1980, the facilities at Louisiana State University-Baton Rouge can be described as being in generally good condition with clear evidence of conscientious maintenance and well-considered programs of building modernization. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 65.02).

172. The facilities at Grambling State University are in worse condition than those of any other public institution of higher education in Louisiana. (Dr. Kaiser's June 1981 Report pg. ——; Depo. of Dr. Kaiser, April 8, 1981 p. 260).

173. In 1980, the Louisiana Board of Regents Facilities Inspection Team determined that "[d]ue to continued inadequate maintenance Grambling's facilities are in the poorest condition of any observed by the Team. What is necessary is a massive rehabilitation and refurbishing program. . ." (Defendants Responses to Plaintiff's Pre-Trial Brief No. 66.01).

174. In 1978, the Louisiana Board of Regents Facilities Inspection team found that "Grambling has a serious condition in that they are currently unable to fight a major fire due to the lack of an adequate water supply system." (Defendants Responses to Plaintiff's Pre-Trial Brief No. 66.02).

175. In 1978, the Facilities Inspection Team also found that there were very grave deficiencies in electrical, plumbing, and other systems in many of the Grambling buildings; these problems were found to be in the nature of an emergency. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 66.03).

176. In 1978, the Facilities Inspection Team reported that serious health and safety hazards would continue to exist at Grambling until the repairs recommended were made. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 66.04).

177. As a result of faulty original construction, poor maintenance procedures and failure to modernize early buildings, Grambling needs major funding to rehabilitate and modernize its buildings, grounds and utilities. (Dr. Kaiser's June 1981 Report pg. 1-11).

178. The academic program at Grambling is hampered by the condition of the institution's facilities. (Dr. Kaiser's June 1981 Report pg. 1-11).

179. The campus of Louisiana Tech University is currently in good condition. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 67.00).

180. In 1980, the Louisiana Board of Regents Facilities Inspection team determined that the physical appearance of Louisiana Tech's campus was good. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 67.01).

181. The condition of facilities at recently established branches of Southern University is inferior to the condition of recently established proximate branches of Louisiana State University. (Depo. of Dr. Kaiser, April 7, 1981 pg. 52-62, 98-103, 106-109).

182. The condition of the UNO campus is good and the facilities show the level of high quality construction and maintenance. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 68.06; Depo. of Dr. Kaiser April 7, 1981 p. 99).

183. The campus of Southern University-New Orleans continues to suffer from poor site selection, poor original construction and poor maintenance. (Depo. of Dr. Kaiser, April 7, 1981 pg. 101-102, 106-107).

184. The facilities of both Southern-Shreveport and LSU-Shreveport are relatively new. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 68.14).

185. The campus of LSU-Shreveport was designed to require minimal maintenance. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 68.15).

186. The campus of LSU-Shreveport is in good condition. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 68.16).

187. The campus of Southern Shreveport-Bossier City is in generally good condition, although improvements are needed in the area of maintenance. (Defendants Responses to Plaintiff's Pre-Trial Brief No. 68-17).

188. Pursuant to Consent Decree provisions concerning facilities, in 1982 a team of expert's, Facilities Study Panel, conducted a study of the physical facilities at Grambling State University, Southern University-Baton Rouge and Southern University-New Orleans to evaluate the condition of campus buildings and to project facilities needs. (Consent Decree pg. 24).

189. After extensive discussions, analysis and inspection of the institution's grounds and facilities, the expert Facilities Study panel recommended (a) enhancement for the three predominantly black institutions, (b) the need for master planning which comprehends academic, facilities, utilities and landscape planning at these institutions, (c) a need for the State of Louisiana to be more concerned about protecting its capital investment on the black campuses, and (d) the need for training sessions for campus personnel on maintenance practices, and consideration of a formula approach to maintenance funding. (A Study of the Physical Facilities at Grambling State University, Southern University-New Orleans, Southern University-Baton Rouge by L. Pettis, G. Le Breton, J. Norton, J. Spencer dated August 6, 1982).

190. The status of consent decree compliance for facilities at the three campusec are as follows:

a) Southern University-New Orleans
There are 8 projects listed by the Board of Regents and 7 projects listed by SUNO. One project is expected to be completed in construction by October 10, 1987; 3 projects are ready for bid; 2 projects are expected to be ready for bid; and no planning has been started on one project. (Affidavit of Dr. Harvey Kaiser).

b) Southern University-Baton Rouge
There are 27 projects agreed upon. Three projects are complete; 7 projects are ready for bidding; and no planning has been started for the remaining 17 projects. (Affidavit of Dr. Harvey Kaiser).

c) Grambling

There are 23 projects agreed upon, 2 projects are completed, 3 projects are under construction; 11 projects are ready to bid; and no planning has started for 7 projects. (Affidavits of Dr. Harvey Kaiser, Dr. Joseph Johnson)

191. Relative to the analysis of the comparative treatment on Non-Consent Decree appropriations for Capital construction by the State of Louisiana, excluding the monies allocated for Consent Decree capital projects, the black institutions did not fare as well as many of the white institutions for capital appropriations in 1982-1986. (Affidavit of Dr. Harvey Kaiser, Attachment B).

192. The Board of Regents did not adjust its five-year capital outlay plan to include a capital improvement recommended by the Assisting Agency in 1985 for Southern University-Shreveport, *i.e.*, a health and physical education multipurpose building, until 1987, as required by Section One (A)(1)(c)(5) of the 1982 Addendum to Consent Decree. (Attachment 5 letter from Margaret

E. Woodward to Jay Heubert (dated April 30, 1985) (enclosing the April 25, 1985 statement of the Board of Regents regarding the Six-Year Institutional Plan for Southern University-Shreveport (page 3 of statement)).

193. The Board of Regents has not adjusted its five-year capital outlay plan to include the Assisting Agency's 1985 recommendation that a comprehensive assessment of facilities' needs at Southern University-Shreveport be undertaken once that institution's permanent off-campus instructionl center became operational. (Attachments 5 and 6, Six Year Institutional Plan for Southern University-Shreveport (pages 119-20)).

194. Southern University-Shreveport's permanent off-campus instructional center, which was required under Section One (A)(1)(c)(5) of the 1982 Addendum to Consent Decree, was not leased until the fall semester, 1987. Formal instruction at the off-campus center did not begin until the spring semester 1988. (*See* Affidavit President Joffre T. Whisenton).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing List of Material Facts to the Motion for Summary Judgment on the Issue of Liability upon the following counsel by depositing same in U.S. Mail, prepaid, addressed as follows:

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"
UNITED STATES OF AMERICA
versus
STATE OF LOUISIANA

MEMORANDUM OF STATE OF LOUISIANA AND THE LOUISIANA BOARD OF ELEMENTARY AND SECONDARY EDUCATION IN OPPOSITION TO PLAINTIFF'S SUMMARY JUDGMENT MOTION AND IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT BY THE LOUISIANA BOARD OF REGENTS

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IN THE UNITED STATES DISTRICT COURT
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versus

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INTRODUCTION

The State of Louisiana ("State") a defendant herein supports the summary judgment motion of the defendant Board of Regents ("Regents") and opposes the motion of plaintiff, United States of America ("United States"), on the issue of liability in this action. The State sets out its reasons below. Additionally, inasmuch as the United States would predicate the State's liability on the action of the Regents, the oversight governance board of Louisiana higher education,[1] the State requests that the Court allow it to adopt the Regents' motion as its own. Ac-

[1] Article 8, Section 5 of the 1974 Louisiana Constitution.

cordingly, for the reason assigned, the State respectfully urges the Court to deny the motion of the United States, to grant the motion of the Regents, and to enter a summary judgment of dismissal in favor of the State. As the Board of Regents concluded in its memorandum, this matter is ripe for summary judgment.

The Louisiana Board of Elementary and Secondary Education ("BESE") was named defendant in this action as the agency with supervision and control of the Bossier, Parish School Board and the St. Bernard Parish School Board, which in turn respectively govern the Bossier Parish Community College and the St. Bernard Community College.

BESE supports the motion of Bossier Parish School Board for Summary Judgment in its favor. Alternatively, BESE opposes the motion of the United States for summary judgment on the liability, issue herein and supports and adopts the pending summary judgment motion of the Board of Regents on that issue. BESE further proposes that the plaintiff has abandoned its claim against the St. Bernard Parish School Board, which was not made a party to or affected by the 1981 Consent Decree or its 1982 addendum. Should the school boards be dismissed from this cause, the dismissal of BESE also will be in order.

THE UNITED STATES DOES NOT HAVE AUTHORITY TO ASSERT FOURTEENTH AMENDMENT CLAIMS

The cause before this Court brought by the United States, through the office of the United States Attorney General, is based on allegations that Louisiana is in violation of the Fourteenth Amendment of the United States Constitution and of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (hereinafter referred to as Title VI).

It is the contention of the State of Louisiana that the Attorney General lacks the statutory authority necessary to establish standing in an action under the Fourteenth Amendment. "A fundamental judicial rule requires that a complainant establish standing before a suit can be properly heard." *United States v. Mattson*, 600 F.2d 1295, 1297 (9th Cir. 1979).

The "[d]etermination that the standing requirement has been satisfied focuses on the party seeking to get his complaint before federal court and not on the issues he wishes to have adjudicated." *United States v. Mattson*, 600 F.2d 1295, 1300 (9th Cir. 1979); citing *Flask v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947 (1968). Congress has not granted the Attorney General the specific statutory authority to bring suits under the Fourteenth Amendment. "The Supreme Court has repeatedly recognized the central role of Congress in establishing appropriate mechanisms to enforce the Fourteenth Amendment." *United States v. City of Philadelphia*, 644 F.2d 187, 200 (3rd Cir. 1980). In another suit brought by the U.S. Attorney General alleging violation of the rights guaranteed to persons under the Fourteenth Amendment, "the United States conceded that the Attorney General lacked the authority to proceed under the Fourteenth Amendment." *United States v. State of Alabama*, 828 F.2d 1532, 1547 (11th Cir. 1987). Therefore, the basis of the suit filed by the United States through the United States Attorney General's Office can only be Title VI.

THE DEFENDANTS ARE NOT IN VIOLATION OF TITLE VI

As the Court has emphasized by the separation of the liability and remedy aspects of this case, identification of the Title VI duty of the defendants is critical to the orderly, efficient, and appropriate resolution of this matter. *Artis v. Georgia Board of Regents*, No. CV 479-251 (S.D. Ga. Feb. 21, 1981) (attached), states what is a

given here, but bears repeating to aid in the clarity of our task—liability will require a current violation of the Title VI obligation. (Id. at 7.)

The United States argues that the Title VI duty is the actual elimination of any "vestige" of the fact that Louisiana's higher education system once was segregated, on the basis of race, by law. Under the standard, liability of the defendants under Title VI would co-exist with any such "vestige." The claim of the United States in this action is the claim delineated by the plaintiff's instant summary judgment motion. The contention is that such a "vestige" is to be found in the perceived deficiencies in the educational programs, faculties, facilities, and funding of historically black institutions vis-a-vis proximately-located historically white institutions, where, the United States claims, the racial mixes at the historically black institutions are significantly disproportionate to the racial mixes of the institutions' student pools. The claimed Title VI rationale for the "vestige" classification is desegregation—parity is required to afford the institutions a real chance to attract whites from their student pools.

Were the Court to find that such disparities exist, the defendants automatically would be in default under their Title VI obligations, according to the argument, and a finding of liability would issue. The Court and the parties would proceed to identification of a remedy tailored to the breach. See *Geier v. Alexander*, 801 F.2d 799, 801 (6th Cir. 1986).

Happily, the State submits, Title VI does not impose such inescapable liability on state officials. As the Board of Regents has ably demonstrated, well-reasoned judicial authority persuasively suggests that default occurs in the context of higher education only in the absence of ongoing good faith efforts by the state to eliminate the vestiges of a former *de jure* system. *Ayers v. Allain*, 674 F.Supp. 1523 (N.D.Miss. 1987); *Alabama State*

Teachers Association v. Alabama Public Schools and College Authority ("ASTA"), 289 F.Supp. 784, 787-789 (M.D.Ala. 1968), aff'd mem. 393 U.S. 400, 89 S.Ct. 681, 21 L.Ed.2d 631 (1969); *Artis v. Georgia Board of Regents, supra.*

The good faith element of the obligation wraps reasonableness and practicality into the Title VI formula. The obligation is aware that the eradication of the far-reaching effects of segregated higher education will take time in many instances, and that achievement of the objective will be advanced through recognition of legitimate and good faith progress. It recognizes the complexities involved in the formulation of educational policies (*ASTA, supra*, 289 F.Supp. at 787-788). It is unyielding in requiring race-neutral policies and procedures in the area of equal access (*Ayers v. Allain, supra*, 674 F.Supp. at 1559: *Hunnicutt v. Burge*, 356 F.Supp. 1227 (N.D.Ga. 1973). Yet, it concedes that not all sound and valid decisions in other educational areas must attempt to maximize the related goal of desegregation (*Ayers v. Allain, supra*, 674 F.Supp. at 1559; *ASTA, supra*, 89 S.Ct. at 788) and forgives racial student body concentration where such concentration promises to eliminate an independent *de jure* vestige and serve the broader Title VI goal of equal educational opportunity. (*ASTA, supra*, 89 S.Ct. at 788). Finally, the proper Title VI duty is sensitive to the impropriety of unwarranted intrusions into the area of education, perhaps the most important function of state government, and to the limits of its own competence in this highly complex and specialized area (*Id.* at 787-788; *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 97 S.Ct. 2766, 2770-2775, 53 L.Ed.2d 851 (1977); *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S.Ct. 2941 and 2982, 2953-4, 61 L.Ed.2d 666 (1978).)

The Board of Regents also has advanced, in its summary judgment motion, undisputed facts that establish

full compliance by defendants of their good faith duty under Title VI. The defendants are not in default. To the contrary, they adopted race-neutral admission policies coincident with Title VI. Further, under the auspices of the Consent Decree, hailed in 1981 for its promise, the Board of Regents discharged or oversaw numerous efforts designed to increase the number of blacks in Louisiana's higher education system and to eliminate the vestigates of Louisiana's former segregative laws within that system.

Although the Consent Decree makes no attempt to identify the accompanying vestiges meant to be abolished, they are apparent from the natures of the obligations themselves. Thus, to combat the lack of information possessed by student pools of educational opportunities at other race institutions, information was disseminated. (Regents' Statement of Material Undisputed Facts, hereinafter "Regents' Facts," #31(a).) To alter the propensities of college and university recruiters to seek students from same-race high schools, personnel were hired, a plan was developed, and funding was made to promote such recruitment. (Regents' Facts, #31(b).)

To meet the unpreparedness of many black students for the vigors of college academic life, comprehensive programs of developmental education were instituted and over $1 million was invested over the six-year period of the Consent Decree, in addition to formula funding, to insure their success. (Regents Facts, #31(e).) Nondiscriminatory hiring practices of the Board of Regents resulted in a race-representative staff. (Regents' Facts, #31(f).) To end the phenomenon of same-race faculties at historically black or white universities, over $1 million in fellowships was awarded to support the full-time graduate study of faculty who would commit to a period of teaching at other-race institutions. (Regents' Facts, #31(g).)

To upgrade programs, faculties, and facilities at historically black institutions that, despite the presence of

a proximate historically white institutions with superior academic and physical features, would continue to draw black students, $48 million was appropriated over the Consent Decree years in connection with the institution of sixty-two new programs at the historically black institutions (Regents' Facts, #31 (h) (i) (1-4)), another $4.6 million was appropriated for a joint allied health program between the institutions and the LSU Medical Center over the same period, and the Board of Regents has recommended the appropriation of, respectively, $15.2 million and $.5 million for the continued support of such programs for 1988-89, beyond the term of the Consent Decree. All such sums are in addition to formula funding. (Regents' Facts, #31(h) (i) (2-6).) Further, $34.2 million was appropriated and received by the historically black institutions for capital improvements to remedy deficiencies identified in 1982 by a panel of experts, and the Regents' five-year capital outlay plan, revised yearly, calls for the appropriation and expenditure of an additional $89.8 million dollars. (Regents' Facts, #31 (h) (ii-iv).) Furthermore, millions were spent to enhance the Southern University Law School and the Grambling State University and the Southern University System. (Regents' Facts, #31(h) (v).) Finally, faculty members without a terminal degree at the historically black institutions were afforded paid leaves toward that goal, and the Board of Regents annually awarded additional monies to Grambling State University and the Southern University System for faculty development. (Regents' Facts, #31(h) (vi).)

To reflect the upgrading of the missions of the historically black institutions due to such enhancement efforts and the enhanced career opportunities of the black students there (see *Hunnicutt v. Burge*, *supra*, 356 F. Supp. at 1231), the institutions prepared revised statements of their missions, and the Board of Regents has approved the statements. (Regents' Facts, #31(i). In approving or terminating duplicative programs at proximate institutions, great care was taken to minimize the

risk of impairing other-race enrollment at the historically black institutions, (Regents' Facts, #31(j), and cooperative degree programs and student exchange programs were developed and instituted at proximate institutions (Regents' Fact, #32(j).) Such actions were geared toward offsetting the tendency of students to choose same-race institutions rather than an other-race proximate institutions offering duplicative programs. As the Regents' Facts states, all such significant financial efforts were made during a severe financial crisis confronting the State of Lousiana, (Regents' Facts, #35-39).

Finally, Regents' points out that the 1988 general appropriations bill (HB626) provides for more than $14.8 million for Consent Decree initiatives, excluding Capital Outlay. (Regents' Facts, #40).

The State of Louisiana submits that such evidence clearly establishes the good faith efforts of the defendants to move seriously and expeditiously to remove the vestiges of past discrimination from its system of public higher education. The defendants have proved their good faith, both under the auspices of the Consent Decree and beyond. There is no claim, and, it is submitted, none could plausibly be made that such good faith will come to an end. Thus, the defendants' current Title VI duty is met.

Additionally, it is clear that the United States is not entitled to the finding of liability it now seeks. The United States has misinterpreted the duty imposed on defendants under Title VI. Contrary to its argument, the presence of vestiges in a system of higher education does not automatically impose liability under Title VI. Thus, even were the "vestige" identified by the United States properly characterized, there would be no automatic liability in this action. Instead, efforts to eliminate the vestige would be tested under the good faith standard outlined above. The factor asserted by the plaintiff to be a "vestige," however, is mislabeled. Identification of a Title VI vestige must be made in the context of the

purposes and scope of Title VI. Placed in that framework, the United States' claimed "vestige"—the alleged "educational inequalities," "educational deficiencies," and "disparities in faculty, funding, facilities, and course offerings" of historically black institutions relative to proximate historically black institutions—does not qualify for Title VI coverage. (Motion of the United States for Summary Judgment, unnumbered p.2; Supporting Memorandum, pp. 5, 9-10.)

Title VI does not focus on historically black institutions per se, but only insofar as they impact the equal educational opportunity of the black student population. There is no contention here that the allegedly superior proximate institutions are not accessible to such students. In the face of such a contention, enhancement of the historically black institution arguably would be required, see *Lee v. Macon*, 453 F.2d 524 (5th Cir. 1971). Nor does the United States allege that the historically black institutions are inadequate to educate the black students who, despite the accessible proximate institutions, will choose and can be predicted to attend the historically black institutions. Arguably, the existence of such an inadequate institution would constitute a "vestige" and require remedial action. *Norris v. State Council of Higher Education*, 327 F.Supp. 1368, 1373 (E.D.Va. 1971) aff'd sub nom. *Board of Visitors of William & Mary v. Norris*, 404 U.S. 907, 92 S.Ct. 227, 30 L.Ed.2d 180 (1971). The claimed disparities herein, however, in and of themselves do not constitute a Title VI vestige and the claim of the United States must fail.

Without benefit of any discussion, the plaintiff alleges that the Louisiana system of higher education continues to be a "dual system" rather than a "unitary" one. The State of Louisiana submits that the duality or unitariness of the system is a characterization without legal significance here. Clearly, the State's *de jure* system of segregation in higher education has ended. There is no claim in this action of *de facto* segregation and the laws

relative to de facto segregation have not been invoked. What is at issue is the record of the defendants in moving to eliminate the vestigial effects of prior *de jure* segregation—its compliance with the applicable standard identified above. The defendants' record, as shown comprehensively by the Regents' Facts, is not only adequate but good, and there is no genuine contention that such good faith will discontinue.

CONCLUSION

Thus, in conclusion, the State of Louisiana submits that the standard against which its conduct should be judged is one requiring good faith efforts to eliminate the vestiges of the prior *de jure* system of segregation in its higher education system. The motion of the Board of Regents shows that such conduct meets that standard. Accordingly, the State of Louisiana respectfully urges the Court to deny the summary judgment motion of the United States, to grant the summary judgment of the Board of Regents, and to enter a summary judgment of dismissal in favor of the State and BESE herein.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing memorandum on behalf of the State of Louisiana and the Louisiana Board of Elementary and Secondary Education has been served upon the following counsel by hand delivery:

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/s/ Winston G. DeCuir
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

CV479-251

MARSHA ARTIS, *et al.*,
Plaintiffs

vs.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, *et al.*,
Defendants

ORDER

[Filed Feb. 2, 1981]

This case is before the Court pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343(3) and (4) and other civil rights statutes. Suit was originally filed August 7, 1979, claiming that the defendant Board of Regents operated a dual system of public colleges in Savannah, Georgia, in violation of the Fourteenth Amendment. Plaintiffs then sought a preliminary injunction to stop implementation of a limited desegregation plan which had been approved by the Department of Health, Education and Welfare, so that a complete merger of the two institutions, Savannah State College (SSC) and Armstrong State College (ASC), could be achieved. A hearing was held on this injunction August 24, 1979. At this hearing plaintiffs announced dismissal of HEW as a party defendant. Evidence on the racial history and composition of the two institutions was also received.

After review of this evidence, the Court concluded in its Order of September 4, 1979, that plaintiffs had failed

to demonstrate either irreparable injury or a substantial balance of harms in their favor. Accordingly, plaintiffs' motion was denied.

Subsequently, this Court has entertained additional evidence and argument particularly at a bench trial held November 12, 1980. At this proceeding, plaintiffs indicated that they had abandoned their demand for a complete merger of SSC and ASC. Instead, plaintiffs argued that this Court should promote desegregation of both schools by requiring a total end to duplication in their program offerings. Plaintiffs also argued that this remedy was demanded by the apparent failure of the HEW plan to achieve its objectives. This plan centralized all business administration courses at SSC and education courses at ASC.

After careful consideration of available evidence and argument, I have concluded that there has been no showing that the current racial composition of the two institutions is the result of constitutional violations by the defendants and not the individual choices of students. In view of this determination, the Court finds that no basis exists for ordering any of the relief here sought. The Court further concludes that, even if certain actions of the defendants did violate constitutional mandates, these actions have had only minimal impact on racial balance at the two schools and have been adequately remedied by the defendants' more recent policies. The reasons for these determinations are developed more fully in the following materials, denominated Findings of Fact and Conclusions of Law. However, should the content of any item be at odds with its classification, content shall be controlling.

Findings of Fact [1]

1. Armstrong State College and Savannah State College are four-year institutions operated by the defendant Board of Regents in Chatham County, Georgia.

2. SSC was originally named Georgia State Industrial College for colored youths. It was created by the Georgia General Assembly on November 26, 1890 for purposes suggested by its name. The University of Georgia and the School for Colored Students jointly operated the school initially in Athens, Georgia. In 1891, it was moved to its present site in Thunderbolt, Chatham County, Georgia. In 1932, the college was renamed Georgia State College and incorporated under the Board of Regents of the University System of Georgia. It was again renamed in 1950, when it became Savannah State College.

3. SSC has remained predominantly black throughout its history. The mean enrollment (full and partime students) for the 1978-79 academic year was 1,949 students. Of these, 1,813 (93%) were black. More recent statistics reflect a higher percentage of white and foreign students, but blacks still constitute about 88% of SSC enrollment.

4. Armstrong State College was first opened in 1935 as a junior college. The City of Savannah operated the institution until 1959 when it became a part of the University System of Georgia. ASC was elevated to four-year status by the Board of Regents in 1964.

5. Armstrong has been and remains today a predominantly white college. No blacks were admitted until 1963. Average quarterly enrollment in the 1978-79 academic year was 2,895 students, of which about 87% were

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[1] Findings of Fact 1-7 are drawn largely from the Court's Order of September 4, 1979. This Order was, of course, based upon evidence placed before the Court at the August 24, 1979 hearing. The remaining portions are based on materials and testimony from the bench trial conducted November 12, 1980. However, in any event, there is little dispute as to facts in this case.

white. The most recent statistics available to the Court indicate that white enrollment is over 83%.

6. In July, 1977, HEW informed the defendant Regents that a desegregation plan accepted in 1974 had been rejected by the District Court of the District of Columbia. *Adams v. Califano*, 430 F. Supp. 118 (1977). Responding to this development, HEW defined new criteria for desegregation of higher education in Georgia as well as several other states. These criteria emphasized (1) use of comprehensive, coordinated statewide plans, (2) development of specific funding commitments and project goals and (3) avoidance of any reduction in blacks' educational opportunities or the status of black colleges. In addition, the revised HEW criteria emphasized elimination of unnecessary duplicative programs among black and white institutions; giving black institutions priority in placement of new degree programs; and increased black utilization of higher education in the affected states.

7. In response to these criteria, the Board of Regents developed a revised desegregation plan for ASC and SSC. This plan was submitted to HEW on October 19, 1978, and approved by it in February, 1979. Under its provisions, ASC and SSC are expected to set up a joint continuing education program for the local population. The plan also calls for elimination of duplicative courses by centralization of the business administration program at SSC, and a similar transfer of all teacher education courses to ASC. In conjunction with these changes, the plan provides for faculty transfers, maintenance of existing funding levels and student scholarships, and free shuttle bussing between the two institutions. The plan provides further for enhancement of SSC by addition of several new degree programs and substantial capital expenditures to improve the physical plant.

8. This plan is only one of many efforts made at least since 1971 to change the clear racial identities of the two

institutions. Joint degree programs were first discussed in 1969 and in fact initiated in 1971. SSC has taken special steps to recruit white faculty. Attempts have also been made to integrate graduate programs. These efforts have occurred through the active cooperation of administrators at the two institutions. There has been no evidence presented which suggests resistence to these steps at either institution. There has been no evidence that any student has been denied access to either institution on grounds of race, at least since the middle 1960s.

9. It is apparent from the statistics on racial composition presented above that the joint efforts of SSC and ASC officials had comparatively little impact on the nature of the two institutions. Testimony presented at trial confirmed that both institutions remain clearly identifiable racially and that neither appears likely to achieve substantial racial balance in the foreseeable future. This conclusion may be particularly applicable where program duplication allows students to choose on both racial and educational grounds. But, in all events, projections under the HEW plan for increased minority enrollment are not being met. Even when duplication has been ended, most students have not chosen to follow their educational interests to a school where they would be in a racial minority. See CL 5.

10. The lack of change in the racial identities of ASC and SSC may be due in some part of the establishment of duplicative programs, notably in social work and criminal justice at the two institutions. Similarly, racially-based decisions by students may be facilitated by the availability of Georgia Southern College (GSC) which is predominantly white and only about sixty miles from Savannah.

However, it appears that the defendants have made substantial efforts to defeat any segregative impact of the existence of duplicative programs. As preparatory steps to eventual merger of the two institutions, joint

programs have been developed between the two colleges in a number of areas including criminal justice and social work. Furthermore, there is no reason to believe that any action taken with respect to GSC has been intended to do more than provide for actual increases in enrollment which have developed out of individual student choices.

11. The primary determinants of the racial character of ASC and SSC are the individual choices of potential students. These decisions are based upon factors such as peer pressure, family ties, as well as educational and athletic opportunities. As was noted above, these decisions are not easily changed by the actions of school officials or development of programs such as the HEW-mandated plan. In fact, Dr. Prince Jackson, former president of SSC and a witness for the plaintiffs at the preliminary injunction hearing testified as follows:

> [F]or students to go to a school in a true society (an integrated school) you have to reduce the number of choices that they have. The reason we have the black and white thing is because students do have choices so we have to reduce the number of choices that they have.

Tr. 44. Thus, the evidence is clear that the overwhelming reason for the racial imbalances plaintiffs complaint of is the individual decisions of students who are, after all, free to attend or not attend college where and when they choose. It is not to be attributed to any active effort to create or maintain segregation by the defendants. It is not likely to be altered significantly by the steps plaintiffs seek or any measures which leave students free to "vote with their feet."

Conclusions of Law

1. This Court has jurisdiction over the present case pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1343(3) and (4) and other civil rights statutes.

2. Where a state has maintained a dual system of education, it has a duty to "disestablish" this system "root and branch." *Green v. School Board of New Kent County*, 391 U.S. 430, 437-38 (1968). However, before any judicial remedy may be imposed, a currently existing constitutional violation must be shown. In the absence of such a violation, no judicial remedy may be imposed. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419-420 (1977); *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 434 (1976); *Milliken v. Bradley*, 418 U.S. 717, 738 (1974).

3. The mere existence of racial imbalance, however pronounced, is not a constitutional violation. *Brinkman, supra*, at 413, 417. Furthermore, the fact that racial imbalances were originally created or promoted by official acts in the distant past does not mean that the continued existence of such imbalance is attributable to these official acts. *Armour v. Nix*, U.S.D.C., N.D.Ga., No. 16780, Order of September 24, 1979, at 20-21.

In the present case, it appears that the overwhelming reason for continued racial imbalances at ASC and SSC is the free choice of students based upon a myriad of factors, some related to educational considerations, others of a wholly personal nature. FF 11.

4. There is authority for the proposition that, where present constitutional violations are found, a state must carry out a complete merger of institutions of higher learning. See *Geier v. Blanton*, 427 F. Supp. 644 (M.D. Tenn. 1977), *Aff'd*, 597 F.2d 1056 (6th Cir. 1979). However, in this Circuit, a state's duty to "disestablish" segregated colleges has been defined in far narrower terms:

> Higher education is neither free nor compulsory. Students choose which, if any, institution they attend. In making that choice they face a full range of diversity in goals, facilities, equipment, course

> offerings, teacher training and salaries, and living arrangements, perhaps only to mention a few.

Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F. Supp. 784, 788 (M.D.Ala. 1967), *Aff'd* 393 U.S. 400 (1969).

> We conclude, therefore, that as long as the State and particular institutions are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantel the dual system on the college level, to the extent that the system may be based upon racial considerations, is satisfied.

289 F. Supp., at 789-790. Thus, the defendants in this case are at most chargeable with a duty to act in good faith with respect to operation of ASC and SSC. They are not constitutionally required to take affirmative action to destroy the racial identities of the two institutions, even to the extent that they are chargeable with direct contribution to that imbalance.

5. Broad relief of the suit plaintiffs seek here cannot be based on any mere *de minimis* or cumulative constitutional violations. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 413 (1977). The actions of the defendants must be a "substantial cause" of the segregation complained of. *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974).

Under the facts now before the Court, it cannot be concluded that any action of the defendants since about 1965 has contributed substantially to racial imbalances at ASC and SSC. Even if racial intent is ascribed to establishment of social work and criminal justice programs at both institutions, the impact of these decisions would appear to be minor. Only seventy-three degrees in social work were conferred by Armstrong between 1972 and 1977. Of these, six went to blacks. Enrollment in

the criminal justice program is apparently higher, but still less than 10% of students at the two schools are involved. Defendants' Exhibit 2, August 24, 1979 (letter of December 15, 1977 to HEW office for Civil Rights, at p. 15). Furthermore, the minority percentages in these programs appear to be about equal to that in the overall student populations. *Id.* Thus, it is difficult to see how either has added to segregation of these institutions.

It is similarly difficult to see how increased funding at GSC could have had any substantial impact on segregation at Armstrong and Savannah State. The appropriations plaintiffs point to concern only the 1980 fiscal year. Of course, the racial imbalances complained of are of much large duration. Moreover, they have persisted for many years in which there is no claim that any action with respect to Georgia Southern was involved.

Furthermore, plaintiffs' own evidence suggests strongly that the presence or absence of duplicative programs has only modest impact on integration in any event. HEW projections indicated that the switch of business and education courses would bring approximately 500 blacks to ASC and 500 whites to SSC. In fact, plaintiffs conclude that only about 114 whites and 85 blacks transferred. Thus, plaintiffs acknowledge that over 80% of affected students simply went elsewhere. It appears then that the defendants have at best very limited capacity to alter student enrollment decisions, even when they follow the policies plaintiffs seek here.

6. Even if the Court accepts *arguendo* the proposition that the Board of Regents have engaged in constitutional violations having substantial present effects, the actions of the defendants in adopting the HEW plan clearly meet the standards of good faith affirmative action discussed in *Alabama State Teacher's Association, supra.* The desirability of eliminating duplicative programs has been accepted and the process, in fact, has begun. Cooperation

between the institutions has developed. There is every likelihood that these policies will be pursued further in view of the quite effective financial pressure which HEW exerts over the defendants, if for no other reason. While this Court finds no constitutional violation which would support such measures, affirmative action in this context is certainly not impermissible. *Regents of the University System of California v. Bakke*, 438 U.S. 265 (1978). These steps clearly move SSC and ASC in precisely the direction plaintiffs here seek.

Discussion

This case presents the Court with several difficult questions of law and fact. There is as yet no settled answer to the problem of how much principles developed with respect to segregation in elementary and secondary education may be applied to colleges like Armstrong and Savannah State. Furthermore, the Court can find no easy method for determining the motivations of the defendants in their various official acts, many of which occurred years ago. Nor can the Court see any simple or definitive way to determine the basis for the educational choices of the many students whose conduct is the basic subjectmatter of this litigation.

However, based on the limited evidence and precedent available in this case, I have concluded that the overwhelming reason for the continued racial identities of ASC and SSC is the individual choice of students with respect to institutions which are neither free nor compulsory. Facts now before the Court suggest that official action has at best only limited impact on choices, which appear to reflect notions about the two schools that are of long standing and considerable durability. The Court further concludes that the overwhelming weight of official action has been toward increasing, not retarding, "disestablishment." To the extent that limited opposite motives or impacts might be seen, it appears that there

has been no substantial contribution to persistent racial imbalances at the two schools. Furthermore, it appears that the defendants have largely, if not completely, abandoned such policies and that they will continue to move in this direction in future years.

This Court is aware of the existence of contrary authority with respect to the legal duty of states which have maintained dual systems of higher education. See *Adams v. Richardson*, 356 F. Supp. 92 (D.C.D.C. 1973), *aff'd* 480 F.2d 1156 (D.C.App. 1973). See also *Adams v. Califano*, 430 F. Supp. 118 (D.C.D.C. 1977); *Blanton, supra*. These cases apply concepts developed with respect to elementary and secondary directly to colleges, without reference to the very significant differences which *Alabama State Teacher's Association, supra*, finds determinative of the state's duty to "disestablish." In this case I have, of course, followed the *Alabama* reasoning. But, it should be re-emphasized that the plan in question was approved by HEW. Thus, there is no real, practical conflict in the direction to which the defendants are committed and the more demanding requirements of *Adams* which plaintiffs here seem to endorse. Furthermore, it is likely that the problems which plaintiffs point to in this plan will bring further attention from HEW (now HHS) and further responses from the defendants. The Court will look with interest upon these developments. But, under present law in the Fifth Circuit, I see no basis for the relief plaintiffs seek. Accordingly, the Court hereby orders that judgment be entered for the defendants.

So Order this 2 day of February, 1981.

/s/ [Illegible]
Judge
United States District Court
Southern District of Georgia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA

STATEMENT OF STATE OF LOUISIANA AND LOUISIANA BOARD OF ELEMENTARY AND SECONDARY EDUCATION REGARDING MATERIAL DISPUTED FACTS

In connection with its opposition to the summary judgment motion of the United States, the defendants State of Louisiana ("State"), and the Louisiana Board of Elementary and Secondary Education ("BESE") respectfully inform the Court that it intends to file and serve on Thursday, June 9, 1988, a request for leave of court to file an amended statement as required by Local Rule 3.10. The defendants anticipate adopting all or portion of the the Rule 3.10 statements that may be filed by the other defendants in their oppositions to the motion of the United States. If the Court grants this request, the Rule 3.10 statement will have been served, well in advance of the Monday, June 13, 1988, due date for responses to oppositions to the pending summary judgment motion.

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TO ALL COUNSEL:

Re: United States of America v.
State of Louisiana, et al
Civil Action No. 80-3300
Section "A"

Enclosed is the Memorandum of the State of Louisiana and the Board of Elementary and Secondary Education in Opposition to Plaintiff's Summary Judgment Motion and in Support of the Summary Judgment Motion of Board of Regents; and the Statement of these parties Regarding Disputed Material Facts.

Sincerely,

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Attorney General

By: /s/ Winston G. DeCuir
WINSTON G. DECUIR

WGD/LMB/moj

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

BOARD OF REGENTS OPPOSITION TO JUSTICE DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

This Memorandum is respectfully submitted by the Board of Regents ("Regents") in Opposition to the Motion for Summary Judgment filed by the United States Department of Justice ("Justice").

A. THE JUSTICE DEPARTMENT'S LEGAL ARGUMENT IS FLAWED

Justice charges the State of Louisiana with failure to fulfill its "affirmative duty to remove the vestiges of its dual system of higher education." (Justice Brief, p. 4). It concedes that enrollments in public higher education are "largely determined by the voluntary choice of private individuals," and that the state is not required to achieve a specific racial balance, or to alter fundamentally the nature of its "educational program." (Justice Brief, p. 5). What the state is required to do, all parties agree, is to offer students a free choice about where they will enroll, unfettered by any past restraints. Justice con-

tends, however, that the historical shackles have not been completely removed; and here the parties diverge.

In a three-part challenge to the present system of public higher education, Justice makes one point over and over again: the state's predominantly black institutions must be further enhanced. First, it claims that the state's predominantly black institutions are unequal, discouraging enrollment by white students. (Justice Brief, pp. 5-7). Second, it claims that the state must take affirmative actions to eliminate any "devices which subtly exclude or separate the races," (Justice Brief, pp. 7-8); the affirmative action Justice has in mind is enhancement of the predominantly black institutions. Third, it maintains that the state must cleanse the system of "racial considerations . . . which directly influence the enrollment choices of students, including, most notably, the type and quality of educational benefits offered at formerly black institutions." (Justice Brief, pp. 8-9). In other words, the state's liability in this action is pitched on its alleged failure to enhance the PBIs sufficiently to satisfy the Justice Department. The remedy for such a failing is, naturally, enhancement of the PBIs.

The Board of Regents has little to add to the critique it made of this anticipated argument in its Cross Motion for Summary Judgment. For ease of reference, the Regents' prior response as it appears in Part V, pp. 33-39 of its Memorandum in Support of its Motion, is set forth below.

"Justice's theory is that goldplated predominantly black institutions will attract more white students. First, Justice posits that disparate treatment of PBIs and PWIs has created unequal institutions. The Board of Regents strenuously disputes this claim in Section VII, *infra.* Building on its erroneous claim, Justice then asserts that the state has the obligation, as part of its affirmative action program, to eliminate the alleged disparities so that the predominantly black institutions can effectively compete for white students. Even apart from the error

in the underlying premise of unequal treatment, Justice's theory is fraught with flaws, not the least of which is that it has been proven not to work in practice.

First, the theory substitutes the PBIs themselves, as opposed to the individuals they serve, as the persons entitled to equal protection. However, the PBIs, as creatures of the state, are incapable of experiencing injury under the equal protection or due process clause, and have no right to raise a Fourtenth Amendment claim. *See United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986); *Ayers v. Allain*, 674 F. Supp. 1523, 1560; *Trenton v. New Jersey*, 262 U.S. 182, 187, 191, 43 S.Ct. 534, 537, 538 (1963); *Drayden v. Needville Independent School District*, 642 F.2d 129 (5th Cir. 1981); *Appling County v. Municipal Electric Authority*, 621 F.2d 1301 (5th Cir. 1980). As the Eleventh Circuit commented with respect to the same argument by Justice and the predominantly black institutions in the Alabama higher educaion case:

> Nothing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a "person" with rights under this statute.

United States v. Alabama, 791 F.2d at 1456.

Second, the theory advanced by Justice has the disturbing ring of a call for "separate but equal" institutions. On hearing the same argument, the Mississippi court properly remarked on its "*Plessy v. Ferguson* doctrinal overtones," before rejecting the argument. *Ayers v. Allain*, 674 F.Supp. at 1561. That the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138 (1896), has been completely repudiated is beyond dispute. *Brown v. Board of Education (Brown I)*, 347 U.S. 483, 74 S.Ct. 686 (1954).

Third, the peculiar focus on enhancement of predominantly black institutions overlooks entirely the state's obligation to promote integration at the predominantly

white institutions. The overall objective of Title VI is to insure that all of the state's citizens are accorded equal treatment, and in particular, that all students are afforded equal educational opportunity. There has been no suggestion that *white* students are being denied equal educational opportunity, and thus the Justice Department's stated concern for the PBIs' ability to attract whites seems strangely out of place. There is nothing in Title VI to suggest that black and white students alike cannot be educated in the state's predominantly white institutions. As noted in the preceding section, the state has chosen, for sound policy reasons, to maintain its predominantly black institutions but this does not mean that the state has somehow disserved its white students by doing so. What Justice really seems to be advocating, without saying so, is that the PBIs must be enhanced so that *black* students will have equal educational opportunities *within the PBIs.* This forces reiteration of the principle that *Plessy v. Ferguson* is no more.

The thrust of the state's efforts under Title VI and the Fourteenth Amendment *should be* to insure educational opportunities for black students at the *PWIs.* In 1987 *more than 47% of the blacks enrolled in Louisiana's public institutions of higher education were enrolled at PWIs.* (Facts, Para. 41). This brings us to the fourth flaw in Justice's enhancement theory. The state of Louisiana is experiencing a profound fiscal crisis. (Affidavit of Brian Kendrick, Commissioner of Administration of the State of Louisiana; Facts, Paras. 35-40). The state's general fund, from which all of public higher education is funded, is extremely limited. The enhancement program proposed by Justice can only be carried out at a cost that will diminish the available fund for predominantly white institutions. Reduction of their appropriations would diminish the quality of education received by the 47% of black students enrolled at the PWIs

just as surely as Justice's proposal is designed to enhance the educational experience of the black students enrolled at PBIs.[3]

The fifth, final, and most serious flaw in Justice's theory is that it does not work. Worse, it is counterproductive to the objectives of Title VI and the Fourteenth Amendment. In 1981, before the Consent Decree was put into place, 54 to 57% of the black students enrolled at institutions of public higher education were enrolled at PWIs. (Facts, Para. 23). In 1987, after six years of enhancement of the PBIs under the Consent Decree, black enrollment in higher education was up, but the PWIs' share of those students had dropped significantly to 47%. (Facts, Para. 41). Despite the increase in black enrollment statewide, the PWIs had approximately 2000 fewer black students than in 1981; the PBIs had approximately 4000 more. (Facts, Paras. 23, 41). At the same time, white enrollment at the PBIs showed only a negligible gain, increasing from somewhere around .3% in 1981 to around 1.1% in 1987. Thus,

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[3] The Mississippi court likewise recognized the illogic of Justice's argument:

> [W]hile differences in level of funding obviously exist, these differences are not accountable in terms of race but rather are explained by legitimate educational distinctions among institutions. The court finds influential the question posed by the defendants. If from the total funding allocated by the legislature, funds that had been allocated to a comprehensive university were taken by the Board and transferred to a black noncomprehensive university, thereby decreasing the availability or quality of a program or programs at the comprehensive university, what would be the effect on black students attending the comprehensive university? Approximately 30% of all black college students attending four-year colleges in the state attend one of the comprehensive universities. To follow plaintiffs' argument to its ultimate conclusion would decrease the quality of the programs available to that 30% of the state's black students.

Ayers v. Allain, 674 F.Supp. at 1562.

Louisiana's predominantly white institutions, many of which were well-integrated in 1981, have lost ground during the term of the Consent Decree, while the state's predominantly black institutions have realized negligible gains. Statewide, the institutions are less integrated after six years of enhancement under the Consent Decree.

The Justice Department and the PBIs have responded to this argument by making the startling claim that the enhancement program is in its infancy, and that its real effects on integration can only be measured after enhancement of the PBIs is complete. Putting aside the illogic of their claim that a course toward failure can be reversed by going farther (and faster, if they have their way) in the same direction, what Justice and the PBIs have refused to acknowledge is that *there is no better explanation for the segregation trend Louisiana has experienced over the past six years except the correlation to the enhancement program.*

To be sure, the state has not yet completed all the initiatives it set out to implement under the Consent Decree. In the area of capital improvements, only $34.2 million of the nearly $125 million the state committed to capital improvements for the PBIs has been appropriated. (Facts, Para. 31(h)(ii)). However, this does not diminish the fact that *$34.2 million*, a sizeable sum, has been appropriated. Similarly, of the 62 new academic programs approved by the Board of Regents for the PBIs, some were implemented in the latter years of the Consent Decree and one program prescribed by the Consent Decree remains to be approved. (Facts, Para. 31(h)(i)(1)). However, this does not diminish the fact that *62 new academic programs*, a tremendous number of programs of tremendous range and breadth, have been put into place, many several years ago. Finally, there has been heated debate between the Board of Regents and the PBIs about the level of supplemental funding the state should provide to support the new academic programs. However, this does not diminish the fact that from 1982-83 through

1987-88 the state appropriated *more than $65 million dollars* for this purpose; and the Board of Regents has recommended *more than $16 million* for 1988-89. (Facts, Paras. 31(h)(i)(2-6)).

If the Justice Department and the PBIs refuse to acknowledge that these extraordinary appropriations have had any effect, there is little reason for the state to spend more, particularly in light of its desperate financial condition. But with or without the concurrence of Justice and the PBIs, it is obvious that such expenditures have produced results and equally obvious what those results have been: the substantial enhancement of the PBIs and the corresponding attraction of black students into the PBIs. Enhancement of the PBIs of course, has been a positive development. The increase in black enrollment statewide is undoubtedly due, in part, to the improvement of the PBIs, and this has probably brought into public higher education black students who would not otherwise have attended college. Additionally, the improved quality of education offered by PBIs as a result of enhancement is a development of which the state can be proud. It is only in terms of integration that enhancement has not produced positive results.

The correlation between the enhancement of the PBIs and the movement of blacks out of the PWIs into the PBIs is inescapable. After all, the enhancement program *was designed to attract more students.* That it was designed to attract *white* students should not defeat the recognition that it has actually served to attract *black* students. Given the racial identifiability of the PBIs and the preference of students for same-race institutions, it was predictable that the new programs would act as a draw for black students, and experience confirms the theory. Of the 1586 students enrolled in the new academic programs at the PBIs, only 146, or less than 10%, are white.

Moreover, while enhancement is not complete for all Consent Decree initiatives, some have progressed much

further than others. For example, new nursing programs were implemented at Southern-Baton Rouge and Grambling in 1985 and 1984, respectively. At Southern, a new nursing building was erected and equipped at a cost of $6,275,000, and supplemental funds of $55,833 were appropriated in 1982-83, $219,307 in 1983-84, $299,027 in 1984-85, $575,659 in 1985-86, $528,514 in 1986-87, and $582,818 in 1987-88. (Beard Affidavit, Exhibits I and K; Facts, Paras. 31(h)(i) and (ii)). Yet of 63 students enrolled in the program in 1987, 6 were white. (Facts, Para. 44). At Grambling, a new nursing building has just been completed and equipped at a cost of $5,175,000. (Beard Affidavit, Exhibit K; Facts, Para. 31(h)(ii)). Even before the building was occupied, however, Grambling had attracted a large number of white students into the program. The dean and much of the faculty were whites hired from Northeast's nursing program. Of 457 students enrolled in 1987, 43 were white. (Facts, Para. 44). In terms of integration, this program is one of the pitifully few success stories. The 43 whites enrolled in that program alone account for nearly one-fourth of Grambling's campus-wide white enrollment. And it is highly significant that integration was accomplished *before* the building was completed, and despite Grambling's protestations that the supplemental funding provided for nursing was inadequate. Enhancement of the PBIs is plainly not the key to integration."

Justice's enhancement theory is ill-conceived and offers no realistic promise of promoting integration. In advancing this single-faceted approach to desegregation, Justice has ignored all the other affirmative actions that could be pursued, measures that have in fact been rigorously pursued by the state of Louisiana: numerous other-race appointments to the Board of Regents and management boards; intensive other-race student recruitment programs; employment of other-race recruiters; other-race scholarships and careful administration of student financial assistance; developmental education programs; ag-

gressive pursuit of other-race administrators, faculty, and staff; graduate fellowship program; black professional clearinghouse; constraint of academic program duplication; and, between proximate institutions, cooperative and joint degree programs and student and faculty exchange programs. These initiatives are described in fuller detail in Section VII(B), pp. 49-67 of the Regents' Memorandum.

Also detailed in that section are the state's substantial, broad-ranging, and costly enhancements of the PBIs, which Justice overlooks entirely in stating its case of inequitable treatment in the state's public higher education system. Inequitable treatment there has been, but the inequality operated *in favor* of the PBIs, which have received an enormous infusion of supplemental funds over the past seven years, unprecedented in the state's history.

As the Regents demonstrated in their prior Memorandum, the state's affirmative obligation is to adopt and implement race-neutral policies and practices throughout public higher education, which it has done. Its affirmative obligation does not "most notably" include a duty to transform all the PBIs into Cadillac institutions when the state's other vehicles of public higher education are Ford Pintos. Nevertheless, in pursuit of Justice's objectives, the state has tuned up, refurblished, and added some luxurious features to its PBIs. While integration was not served, Justice's program was. Under any theory of the case, the state of Louisiana has upheld its obligations under Title VI of the 1964 Civil Rights Act and the Fourteenth Amendment.

B. JUSTICE'S LIST OF MATERIAL FACTS IS LARGELY IRRELEVANT, UNSUPPORTED AND ERRONEOUS

The list of material facts appended to Justice's Motion for Summary Judgment is strangely detached from the Motion itself and from the Memorandum in Support.

Justice's Memorandum scarcely makes reference to the facts except to assert, generally, that Louisiana once maintained a segregated system of public higher education, and to allege, generally, that Louisiana is not treating its PBIs equitably. No effort has been made to incorporate the facts into the Motion or Memorandum or to explain the materiality of countless allegations which have no reference elsewhere in Justice's submission. The Regents have filed an accompanying response to Justice's list of facts addressing each allegation singly; but some additional general observations are in order.

The state's shameful history of segregating institutions of higher learning makes good cannon fodder, and Justice takes aim at every ugly detail. Virtually all facts relating to the creation and maintenance of separate institutions for blacks and whites prior to *Brown v. Board of Education* are admitted. However, Justice goes on to blur the distinction between past and present, overlooking the changes wrought by time, by law, and by a new generation of administrators, faculty, staff, and students. In making the assertion that discrimination persists in public higher education, Justice is simply and demonstrably wrong.

For many of its allegations, Justice cites defendants' 1981 Responses to its Pretrial Brief or Requests for Admission despite the facts that defendants' *denied* or disputed the allegations. See, *e.g.*, Pars. 4, 6, 8, 13, 15, 22, 67, 69. For others, Justice cites no authority at all, although its proposition has already been disputed on the record. See, *e.g.*, Pars. 73, 103. For some it cites sources such as the CDMC reports, but misreports the data contained therein. See, *e.g.*, Pars. 34, 46, 51, 80-82. For others, Justice cites stale authority in support of statements that purport to reflect current conditions, alleging, for example that the PBIs have not developed programmatically or have poor facilities, on the strength of analyses made in 1981, before 62 new academic programs

were implemented or the capital enhancement program undertaken. See, *e.g.*, Pars. 84, 167, 169, 182. For still others, Justice cites to the 1981 reports of its experts, which were so soundly refuted at the time they were made there could be little doubt the defendants would accept them today. See, *e.g.*, Pars. 122-125, 127, 128, 132-140. Finally, Justice makes numerous distortions of fact or inferences, for instance, criticizing the PWIs for showing slim gains in other-race employment without reference to the diminutive pool of qualified black faculty, see Pars. 79-83, claiming "substantial progress" belied by the figures it cites, see Par. 74, or excoriating the state for providing less funding for SUBR than the state's flagship university LSU-BR, where operations are far more costly. See Pars. 141-151.

When the facts are set straight, little remains of Justice's "list" but the original, uncontested fact that Louisiana once maintained a segregated system. This provides no basis for summary judgment on the issue of current liability for current conditions. In connection with its Cross Motion for Summary Judgment, the Board of Regents has presented a carefully detailed statement of facts, which shows that the state has upheld its legal obligations and is entitled to summary judgment in its favor.

Respectfully submitted,

/s/ Margaret Woodward
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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6th day of June, 1988, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed, and first class postage prepaid.

/s/ Margaret Woodward

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

BOARD OF REGENTS' AMENDED STATEMENT OF MATERIAL UNDISPUTED FACT

NOW INTO COURT, through undersigned counsel, comes defendant Board of Regents of the State of Louisiana, and makes the following amendment to its Statement of Material Undisputed Facts filed in the record on May 3, 1988:

Paragraph 47 of the Board of Regents' Statement of Facts and Paragraph 34 of the Beard Affidavit executed on May 12, 1988, both filed in the record on May 13, 1988, report as the mean ACT scores for proximate institutions the mean ACT scores for the English section of the ACT test. The Board of Regents had intended to focus attention on the mean *composite* ACT scores for freshmen, as reflected in Attachment P to the Beard Affidavit. Those scores, for the year 1987-88, were as follows:

Institution	Mean Composite Score	% 15 or Below	% 16 or Above
Grambling	11.0	84	26
La. Tech	18.3	33	67
SU-BR	11.3	82	17
LSU-BR	19.6	23	77
SU-NO	9.7	92	8
UNO	16.4	45	55

There is a seven to eight point divergence in scores at each proximate institution.

Respectfully submitted,

/s/ Margaret E. Woodward
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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6th day of June, 1988, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.

/s/ Margaret Woodward

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

BOARD OF REGENTS' OPPOSITION TO STATEMENT OF FACT BY JUSTICE DEPARTMENT

NOW INTO COURT, through undersigned counsel, comes Board of Regents of the State of Louisiana and in accordance with Local Rule 3.10 sets forth the following Statement of Facts as to which it is contended that there exists a genuine issue to be tried:

MATERIAL FACTS

1. This is a statement of law, not fact, requiring no response.

2. Admitted.

3. The Board of Regents admits that all of Louisiana's public institutions of higher education have received federal financial assistance but denies, as a matter of law, agreement to comply with Title VI of the Civil Rights Act of 1964, as interpreted by the Justice Department; the requirements of compliance must be made clear before it can be said that the state has agreed to be bound by them (see § IX of the Board of Regents' memo-

randum in support of its motion for summary judgment, pp. 71-88).

4. The Board of Regents admits that a January 13, 1969 letter was forwarded by HEW to the state of Louisiana, but avers that said letter is the best evidence of its content. In addition, the Board of Regents denies the paraphrasing in this paragraph of the conclusion reached by HEW. (The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief, No. 3.00-3.07, as supporting this allegation without qualification).

5. Admitted, with the qualification that the state did not submit a desegregation plan as requested by HEW because the state contended that it was then in compliance with Title VI of the 1964 Civil Rights Act. (Beard Affidavit, Attachment M; Board of Regents' Statement of Fact, Par. 31(i)).

6. The Board of Regents admits that a March 23, 1973 letter was forwarded by HEW to the Louisiana State University Board of Supervisors, but avers that said letter in its entirety is the best evidence of its content. Furthermore, the Board of Regents denies the conclusions reached by HEW in said letter. (The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief, No. 3.23, as supporting this allegation without qualificaiton).

7. See Response to Paragraph 6.

8. Denied. The state was never requested to submit a "commitment" except as part of a plan. The plan demanded by HEW was beyond its statutory and legal authority. (Defendants' Responses to Plaintiff's Pretrial Brief, No. 3.36, miscited by the Justice Department as supporting this allegation).

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. The Board of Regents denies any implication that any of the institutions of public higher education recently has served or presently serves only blacks or whites. The remainder of this paragraph is admitted. (Defendants' Responses to Plaintiff's Pretrial Brief, No. 6.01, miscited by the Justice Department as supporting this allegation without qualification).

14. Admitted.

15. Denied. The cited authorities do not support this allegation, as defendants denied this allegation when made in Paragraph 8.00 of plaintiff's 1981 Pretrial Brief; it was admitted only with reference to a time period prior to 1950, which is irrelevant to this action. (Defendants' Responses to Plaintiff's Pretrial Brief, No. 8.00).

16. Admitted.

17. Admitted.

18. Admitted.

19. Admitted.

20. Admitted.

21. Admitted.

22. Denied. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief, Nos. 11.01 to 11.03 and 11.08 to 11.16, and defendants' responses and amended responses to plaintiff's first request for admissions, Nos. 38, 39, 42 to 46, 49 to 52, and 58 to 62, as supporting this allegation. The allegation set forth in the present paragraph 22 was presented initially in plaintiff's pretrial brief, No. 11.00, which defendants denied "on the grounds that terminology used does not sufficiently identify either the time period or the statute to which plaintiff is referring."

23. Admitted, for a limited period of time. Denied with respect to recent or present times. (See Board of Regents' Statement of Facts, Par. 16).

24. Admitted.

25. Admitted.

26. Denied as written. In 1956, branch campuses of Louisiana State University and Southern University were established in New Orleans, and in 1964, two-year commuter college branches of Louisiana State University and Southern University were established in Shreveport. (See Board of Regents' Statement of Material Undisputed Facts, Pars. 5(m), (n), and (p), and Exhibit 2).

27. Admitted.

28. Admitted.

29. Denied as drafted. The Justice Department miscites the listed authorities as support for this allegation. The Board of Regents admits that in 1964 official publications listed institutions of public higher education as "white" or "negro" and that the Louisiana School Directory in 1966-67 and 1967-68 noted that Grambling College, Southern University, A&M College, and Southern University in New Orleans had formerly been listed in the directory as all-negro schools. (See Defendants' Responses to Plaintiff's Pretrial Brief, Nos. 14.01 to 14.05).

30. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 18.02 as authority for this allegation. Defendants' response stated:

> Defendants admit that a master plan was issued in 1972, but aver that the said plan is the best evidence of its content. Furthermore, defendants deny the implication that the 1972 master plan condoned the formerly legally segregated system and aver instead that it took recognition of it as an historical fact but strongly urged and supported the progress that had been made in converting to a unitary ystem.

31. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 19.06 as authority for this allegation. The response reads:

> Defendants admit that the master plan of 1978 does not specifically address recommendations in the master plan of 1972 concerning the establishment of unitary systems of public higher education, but aver that said plan does include recommendations that would ultimately accomplish the same result.

32. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 20.01 as authority for this allegation. The response reads:

> Defendants admit that the 1980 progress report does not specifically address the disestablishment of the former dual system and defendants aver that it was not its purpose to do so. However, said report does include recommendations that would accomplish the same result.

33. Denied. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 27.00 and the Consent Decree Monitoring Report for 1987 as authority for this allegation. The response reads:

> Defendants admit that public institutions of higher education historically were governed by boards whose membership was racially segregated, but defendants deny that the present racial compositions of the governing boards and their staffs reflect patterns and vestiges of segregation.

The present composition of the boards is set forth in Paragraph 12 of the Board of Regents' Statement of Material Undisputed Facts and in Attachment A to the Beard Affidavit. In 1988 the composition of the boards had reached or nearly reached the racial mix established as a goal by the Consent Decree.

34. Denied. The Justice Department miscites Defendants' Responses to Plaintiffs' Pretrial Brief No. 27.06 an dthe Consent Decree Monitoring Committee report as authority for this allegation. Plaintiff's pretrial brief No. 27.06 properly states that the appointments were all made after January 1, 1965.

35. Admitted, with respect to gubernatorial appointments. This allegation omits reefrence to the Board's student member. (See Beard Affidavit, Attachment A).

36. Admitted.

37. Admitted.

38. Admitted.

39. Admitted.

40. Admitted with the qualification that powers of management not specifically vested in the Board of Regents by the Constitution *or statutes* are reserved to the three management boards.

41. Admitted.

42. Admitted.

43. Admitted with the addition of the Paul M. Hebert Law Center and the LSU Agricultural Center. (See Board of Regents' Statement of Material Undisputed Facts, Par. 4).

44. Admitted.

45. Admitted.

46. Denied. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 27.26 and the Consent Decree Monitoring Committee report as authority for this allegation. Response No. 27.26 properly states that all appointments have been made since January 1, 1975.

47. Admitted, with respect to gubernatorial appointments. This allegation omits reference to the Board's student member. (See Beard Affidavit, Attachment A).

48. Admitted with the notation that a black member of the Southern Board resigned in April of 1988 and has not yet been replaced, and that reference to the student member has been omitted. (See Board of Regents' Statement of Material Undisputed Facts, Par. 12; Beard Affidavit, Attachment A).

49. Admitted, with the revision that Delgado's proper name is Delgado Community College. (See Board of Regents' Statement of Facts, Par. 3).

50. Admitted.

51. Denied. The Board of Regents is composed of fifteen members appointed by the Governor with the consent of the Senate and one student member elected by the Council of Student Body presidents. Each of the management boards is composed of seventeen members appointed by the Governor with the consent of the Senate and one student member elected by the Systems Student Advisory Council. All board members serve six-year overlapping terms while the student members serve one-year terms. (See Board of Regents' Statement of Material Undisputed Facts, Par. 10).

52. Admitted with respect to gubernatorial appointments. The student member, who has a vote, is black. (See Board of Regents' Statement of Undisputed Material Facts, Pars. 11 and 12, and Attachment A to Beard Affidavit).

53. Admitted with the addition of the Board of Supervisors of Southern University and Agricultural and Mechanical College, and with the qualification that the Board of Regents is the planning and coordinating board for public higher education while the remaining three boards are managing boards. (See Board of Regents' Statement of Material Undisputed Facts, Pars. 2, 3, 4 and 9).

54. Admitted.

55. The Board of Regents adopts the LSU Board of Supervisors' response to this allegation.

56. Admitted.

57. The Board of Regents adopts the LSU Board of Supervisors' response to this allegation.

58. Admitted.

59. Denied. See Response to Par. 57.

60. Denied. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief Nos. 30.12 to 30.13 as authority for this allegation. In their responses to those numbered paragraphs, defendants noted "Defendants do aver that the contract monies provided to Meharry by the state of Louisiana were offered on a non-racial basis and were to benefit student of all races." See also, Response to Par. 57.

61. Admitted.

62. Admitted.

63. See Response to Par. 57.

64. Denied. Although the Consent Decree Monitoring Committee reports demonstrate that enrollment in professional programs at Louisiana's public institutions of higher learning is predominantly white or predominantly black, the programs themselves are not racially identifiable and are open to students of all races. The state has taken extraordinary measures to attract other-race students into professional programs, including provision of substantial scholarships for black students. (See Board of Regents' Statement of Material Undisputed Facts, Pars. 16, 25, 31(d)(ii), and 43, and Attachments B and O to the Beard Affidavit).

65. Denied. See Response to Para. 64.

66. Denied. Enrollment data for the state's proximate institutions is reflected in Attachments B and O to the Board Affidavit. To the extent that segregation per-

sists, it is the product of student choice and not a "vestige of the former dual system". See Board of Regents' Statement of Material Undisputed Facts, Pars. 16, 53-56).

67. Denied. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief Nos. 43.01 to 44.00, 44.02, 44.04 to 44.12, 44.14, 45.01 to 49.01, 49.03 to 49.05, 50.01, 50.05 to 50.13, and the Consent Decree Monitoring Committee reports as authority for this allegation. The miscited responses, many of which denied the allegations, address the timing of employment of other-race administrators, faculty and staff at various institutions of public higher education. None speak to "vestiges of the state imposed system of higher education" and the Consent Decree Monitoring Committee reports show gains in other-race employment.

68. Denied. Defendants' Response to Plaintiff's Pretrial Brief No. 77.01 averred, "A dual system existed in Louisiana only to the extent authorized and fostered by federal law."

69. Denied. The Justice Department miscites defendants' response and amended responses to plaintiff's first requests for admissions, Nos. 101 and 102, as authority for this allegation. The requests were not admitted, and at any rate, addressed only the period up to 1981.

STUDENT ENROLLMENT

70. Denied. The Board of Regents objects to the wording of this paragraph. The predominantly black institutions remain predominantly black as a result of student choice and not because the state "established [them] to serve" that "clientele". See Response to Par. 64.

71. See Response to Para. 70.

72. Admitted.

73. Denied. The numbers speak for themselves. In terms of numerical increase, LSU-Baton Rouge showed

considerable gainst in other-race enrollment. Moreover, the Justice Department cites no authority for its assertion that LSU-Alexandria is one of the state's "larger institutions/campuses", which it is not.

74. Denied. The numbers speak for themselves and if Justice denies "substantial progress" in undergraduate other-race student enrollment at LSU-Baton Rouge, it cannot assert "substantial progress" here, where the numbers are smaller.

75. Denied. The numbers speak for themselves.

76. Denied. The numbers speak for themselves.

77. Denied. The numbers speak for themselves.

78. Denied. The numbers speak for themselves.

EMPLOYMENT

79. Denied as drafted. Table 11 of the 1987 Consent Decree Monitoring Committee Report demonstrates that the faculty and staffs of the predominantly white institutions continues to be predominantly white and the faculty and staffs of the predominantly black institutions continues to be predominantly black. However, the pool of black faculty possessing the terminal degree is extremely small. For example, in 1988, blacks represent 1.4% of all persons with Ph.Ds in biology, 1.1% of those in engineering, 1.4% of those in mathematics, 9.1% of those in education, 4.1% of those in political science, and 3.1% of those in history. Within the Louisiana State University system [1], black hiring from 1982 to present has exceeded the level one would expect using a perfectly racially neutral selection process. Within the LSU sys-

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[1] Appendix 1 to Dr. Siskin's report reflects the percentage of blacks among recipients of the terminal degree in 1988. His report, however, analyzes hiring patterns only at the Louisiana State University system campuses, because only LSU responded to the Board of Regents' Interrogatories and Requests for Production in time for inclusion in Dr. Siskin's analysis.

tem, the number of black hires is 10 more (or 25% higher) than expected. This is clearly consistent with an affirmative effort to hire black faculty. A difference of this magnitude or more, however, has an 11% possibility of occurring by chance. Thus, using normal statistical (and judicial) standards for statistical decision-making, one cannot solely, on the basis of the statistical pattern, conclude that the traditionally white institutions favored blacks. However, the pattern of hiring, in relationship to the qualified labor pool, is consistent with an affirmative effort to hire blacks and clearly does not support the contention that the traditional white schools continued to be racially identifiable. (See Affidavit of Bernard R. Siskin, his attached report, and analysis of faculty hiring at the Louisiana State University system campuses, Exhibit 2, and Appendix 1 to his report).

80. See Response to Par. 79. In addition, the Justice Department has inaccurately reported the figures from Appendix A, Table 11 of the 1987 CDMC report. During 1981 the percentage of other-race executive, administrative, and managerial positions at the predominantly white institutions ranged from 0% to 18.2%.

81. See Response to Par. 79. In addition, the Justice Department has inaccurately reported the figures from Appendix A, Table 11 of the 1987 CDMC report. The percentage of other-race executive administrative, and managerial staff ranged from 0% to 2.7% in 1981. In 1986, the other-race positions ranged from 0% to 7.7%.

82. See Response to Par. 79. In addition, the Justice Department has inaccurately reported the figures from Appendix A, Table 11 of the 1987 CDMC report. In 1986, the other-race full-time faculty at the predominantly black institutions ranged from 11.9% to 27.8%. Also, considering that the pool of white faculty, administrators and staff is substantially higher than the pool of blacks, the inference drawn by the Justice Depart-

ment's "contrast" of the slightly higher percentages of other-race administrators, faculty and staff employed by the predominantly black institutions is unfair.

83. Denied. See Response to Par. 79.

ACADEMIC PROGRAMS

84. Denied. Conrad's deposition was given in 1981, *before* the state implemented 62 new academic programs at the predominantly black institutions, at a cost, thus far, of nearly $50 million. (See Board of Regents' Statement of Material Undisputed Facts, Par. 31(h)(i)).

85. The Board of Regents adopts the LSU Board of Supervisors' response to this allegation.

86. The Board of Regents adopts the LSU Board of Supervisors' response to this allegation.

87. Admitted.

88. Denied. (See 1880 La. Acts No. 87).

89. Admitted.

90. Admitted.

91. Admitted.

92. Admitted, with the notation that Louisiana Tech and the University of Southwestern Louisiana also offered first graduate degrees in that year.

93. Admitted.

94. Admitted, but see Response to Par. 95.

95. Admitted, with the qualification that the date of establishment of an institution has no bearing on its authority to offer the doctoral degree. Of the senior institutions, Northwestern [2], McNeese, Nicholls, Southeastern, LSU-Shreveport, and Southern-New Orleans do not

[2] Northwestern and McNeese at one time were authorized to offer doctoral degrees, but that authority was subsequently taken away.

offer the doctoral degree. Southern University-Baton Rouge currently does offer the doctoral degree.

96. The Board of Regents has no information on which to base a response to this allegation.

97. The Board of Regents has no information on which to base a response to this allegation.

98. Admitted, with the notation that the reference is to Attachment 2.

99. Admitted, with the notation that the reference is to Attachment 2.

100. Denied as to bachelors and masters/specialist degrees. Conrad's "Count of Disciplines" is unorthodox and unsupported. Admitted with respect to doctoral programs and professional degrees.

101. Denied. See Response to Par. 100. Admitted with respect to professional degree in veterinary medicine.

102. Admitted.

103. Denied. No authority is cited for this allegation. (It was made, and denied in Plaintiff's Pretrial Brief No. 72.20).

104. Admitted.

105. Admitted.

106. The Board of Regents has no information on which to base a response to this allegation.

107. See Response to Par. 106.

108. Admitted.

109. Admitted, with the notation that the reference is to Attachment 2.

110. Denied. See Response to Pars. 95 and 100. Admitted that Grambling offered no doctoral degree in 1980, with the clarification that it now does . (See Attachment M to Beard Affidavit).

111. Denied. See Response to Par. 100. Admitted that Louisiana Tech in 1980 offered doctoral degree programs in two major fields.

112. Admitted, with the clarification that UNO was originally established as the Metropolitan Commuter's College in the Greater New Orleans Metropolitan area. (See Defendants' Responses to Plaintiff's Pretrial Brief No. 72.29.

113. Admitted.

114. Admitted, with the notation that the reference is to Attachment 2.

115. Admitted.

116. Admitted, with the clarification that as of 1981 SUNO had never made a request of either the Board of Regents or the Coordinating Council to offer degrees beyond the undergraduate level. (See Defendants' Responses to Plaintiff's Prerial Brief, No. 72.33).

117. See Response to Par. 116.

118. Denied. See Response to Par. 100.

119. Admitted.

120. Admitted.

121. Admitted.

122-125 and 127-128. Denied. See Deposition of Robert O. Berdahl, then Professor of Higher Education, University of Maryland, College Park, and former Director of Study of Statewide Coordination of Higher Education for the American Council on Education:

In general, he testified, "making programmatic decisions . . . [is] a very involved process. The institutions obviously feel they just want to be able to do anything they can get the legislature to vote money for. But the legislature isn't staffed to make that kind of sophisticated curriculum planning decision. And therefore it

turns to a statewide board that is allegedly disinterested. You know, it looks on and says this is good for the state, not just good for institution X and Y or Z. Therefore, there is tension between the institution wanting to be more things to more people, growing bigger and better, and the statewide board trying to keep some semblance of balance and rational allocation of programs, wise use of limited resources and quality monitoring." (Deposition of Robert O. Berdahl, June 5, 1981, Exhibit 2, pp. 52-53).

"It is entirely traditional for the better state plans to include recommendations or confirmations if they are already in place of a system called differentiation of function, whereby certain institutions are encouraged or mandated, depending upon whether the statewide board has binding powers or an advisory role, to confine their academic programs of research or service to certain designated types of activities and that this, where some concentrate on the advance doctoral and professional programs and basic research and then from, the so-called four or five year college mission, that is explained in some detail in the Carnegie classification document we referred to earlier. And certainly the two-year mission, which is the easiest to differentiate, are normally part of a good statewide planning package." (Berdahl Deposition, Exhibit 2, pp. 141-142).

"The 1978 [Louisiana master] plan did [set forth differentiation of roles] and [he] felt it did an excellent job." (Berdahl Deposition, Exhibit 2, p. 153).

"It is conceivable that an institution of total mediocrity could be designated by the state to start a new program and given the immense amount of start-up resources necessary for it to go out and hire Nobel prize winners and bring them to the otherwise mediocre campus and have an outstanding program. But that's a most unlikely scenario. . . . Normal equality does proceed out of quality. And it is certainly reinforced by quality

in adjoining academic fields." (Berdahl Deposition, Exhibit 2, pp. 180-181).

"[Dr. Conrad, in his 1981 report,] takes a grossly oversimplified approach to defining unnecessary program duplication . . . to merely take the idea of every institution should offer a general education core of subjects, but that anything they offer beyond that at the bachelor's level and then all masters and then all doctoral duplication, is by definition unnecessary, seems to me to play fast and loose with the word unnecessary. . . .] [Conrad says in his testimony either in the report or in the deposition that he did not at all consider student need, which is universally around the country considered a vital element in whether or not a program duplication is necessary or unnecessary. Also, in terms of defining the necessary duplication only to that core of subjects required for general education, ignores the fact that hundreds and hundreds of colleges have a kind of a minimal, critical mass of degree offerings that go beyond the general education core. . . . In my experience in other states, if we were to apply the Conrad criteria, we would be guilty, not of a black-white unnecessary program duplication, but of a race neutral unnecessary program duplication, place after place after place. . . . If you apply the word unnecessary as loosely as I feel Conrad did, the whole country would be in jail. And that seems to me not a useful criterion and especially to apply it to the specific black-white context of Louisiana. (Berdahl Deposition, Exhiibt 2, pp. 181-186). . . . and I was amused to see in Conrad's testimony that he did not seem to be able to rely on any other previous research . . . but I know of none. . . ." (Berdahl Deposition, Exhibit 2, pp. 187-188).

In discussing program inequality "Dr. Conrad has inappropriately linked program quality with what he calls institutional prestige. Now there may be a link, but it certainly is not a proven one-to-one linkage. He says

that the more programs an institution has, both in breadth of scope and in height, in terms of level of degrees, the more prestige it has and therefore program quality is high. And I think quote and therefore quote is a very faulty logic. You can have high quality programs at a four-year liberal arts college. One thinks of Amherst and Dartmouth and Swarthmore, and to impute that institutional prestige is synonymous with program quality, I think makes a leap in logic that I feel uncomfortable with." (Berdahl Deposition, Exhibit 2, pp. 206-207).

Dr. Conrad "has an appendix on library comparisons . . . but I was concerned that he made only a passing effort to relate the size and quality of holdings to the mission of the university, the size of the university. He said there are variables and then dropped it. And it seems to me if anyone were going to take that appendix seriously, it would require much more rigorous analysis than he gave it. (Berdahl Deposition, Exhibit 2, pp. 212-213).

"I found [Dr. Conrad's] data on program inequality was from 1955 to 1970, and my impression to the limited extent that I have knowledge of Louisiana is that in the past decade, things have improved. (Berdahl Deposition, Exhibit 2, p. 213).

126. Admitted.

129. Denied. No authority is cited for this allegation by the Jusitce Department and it overlooks entirely those efforts briefly set forth in response to Par. 84.

Denied. It is misleading to address, as the Justice Department does, the viability of over 50 academic programs implemented at the predominantly black institutions pursuant to the Consent Decree. Some of the new programs have achieved professional accreditation, others are candidates for accreditation, and others have only recently been implemented. Some have attracted and graduated students of both races, while others have proved to

be only minimally attractive to students of either race. The viability of an academic program depends on many factors, including financial support, institutional and departmental leadership, faculty expertise, and student demand. In recognition of the requirements of Part II, Section Seven (B)(4) of the Consent Decree and Section One (A)(1)(C)(4) of the Addendum to the Consent Decree, the Board of Regents has proposed continued outside-the-Formula funding for the academic programs established in accordance with Consent Decree and Addendum requirements. Such funding is reported in Paragraph 31(H)(1) of the affidavit sworn by affiant on May 12, 1988 and previously filed into the record. (Beard Affidavit, Par. 2).

131. Denied. In addition to the steps taken to implement new Consent Decree academic programs at the predominantly black institutions, the Board of Regents has taken numerous steps to enhance existing academic programs at the predominantly black institutions. Except in rare cases, the initiation of new academic programs strengthens existing related programs. For example, providing start-up funds for a graduate program in social work will strengthen the undergraduate program in social work; providing program funding for business administration or public administration definitely enhances academic programs in related areas; and so on. Moreover, the state provided general enhancement funds to the Southern University system and to Grambling for a period of six years. Over the term of the Consent Decree, more than $2 million was appropriated in general enhancement funds for Grambling and well over $3 million in enhancement funds was appropriated for the Southern system. Many of these funds were expended in areas which enhanced academic programs. The annual budget for general enhancement funds can be found in Appendix A of the CDMC Annual Reports. Additionally, faculty development funds were provided for the campuses of the Southern University system and for Grambling. This

program allowed faculty from the PBIs to pursue their terminal degrees, thus enhancing the academic programs in which they taught. Information on participants in this program can also be found in Appendix A of the CDMC Annual Reports. The Board of Regents also conducted ongoing academic program reviews which identified weaknesses and provided recommendations to strengthen existing academic programs. Additionally, the provision of many millions of dollars for capital outlay projects for the campuses of the Southern University system and Grambling enhanced, directly or indirectly, the academic programs on those campuses. (Beard Affidavit, Par. 3)

FINANCES

132-140. Denied. Dr. Leslie's analysis, on which these allegations are based, was refuted in a 1981 critique prepared by Dr. Frank A. Schmidtlein, then Assistant to the Chancellor and Affiliate Assistant Professor of Higher Education at the University of Maryland, College Park:

Every institution is unique if one examines its characteristics in sufficient detail. This uniqueness applies to, among other things, the mission of the institution and its units, the advantages and constraints of its locations, and the methods it employs to reach its goals. If one ignores such important sources of differences when comparing costs among institutions, the results at best are meaningless, and at worst can be seriously misleading. (Exhibit 1, a critique of the report prepared by Dr. Larry L. Leslie, dated March 23, 1981 by Frank A. Schmidtlein, May 22, 1981, hereinafter "Schmidtlein Critique", Exhibit 1, p. 4).

To be meaningful, a cost study should take into account institutional missions; the level of students (the average direct cost of doctoral credit hours may run from three to seven times that of lower division credit hours); different mixes of academic programs; institutional size; program complexity; and a number of other factors

(Schmidtlein Critique, Exhibit 1, pp. 4-22). The substantive and methodological problems involved in making valid cost studies, and using them for comparative purposes, are so great that comparatively little use is made of inner institutional comparisons (Schmidtlein Critique, Exhibit 1, p. 23).

Dr. Leslie's March 23, 1981 report followed an unorthodox approach in assuming that certain institutions should have comparable missions and then comparing their historic costs without reference to their extensive actual differences. The comparisons, therefore, do not distinguish historic costs resulting from mission differences from those which might result from funding inequities. (Schmidtlein Critique, Exhibit 1, pp. 25-26).

Dr. Leslie's March 23, 1981 report postulates that "because university A has a large number of unique programs that historically have expended relatively large amounts of money, its total appropriations always have been larger" (p. 7). The implication appears to be that this represents an inequity in funding. In fact, the "large number of unique programs" in a major/graduate university normally cost more than those in institutions with less graduate students, less emphasis on research and public services, and less expensive disciplines. (Schmidtlein Critique, Exhibit 1, p. 36).

Dr. Leslie's comparison of the costs of Louisiana State University-Baton Rouge and Southern University-Baton Rouge, in particular, illustrates the shortcomings of the comparative cost approach employed. The comparisons implied that the two institutions have, or should have, similar missions and, therefore, similar costs. In fact, they do not. Moreover, the need for two such similar institutions in a state with approximately 4 million population is not immediately obvious. (Schmidtlein Critique, Exhibit 1, p. 26).

In one set of comparisons, Dr. Leslie contrasts per-student costs of the LSU system, having seven campuses

and centers, with the Southern University system, which has three campuses. In 1978, the Board of Regents classified the LSU campuses as having three different missions: comprehensive university (one campus), senior university (two campuses), and two-year college (two campuses). In 1978, two Southern campuses were classified as senior universities, and one as a two-year college. These campuses had different missions, enrollments and mixes of academic programs. Consequently, aggregate system-wide costs per students have no comparative validity. No cost studies found in the literature made such system-wide comparisons, nor is there any support in the literature for such a comparison. (Schmidtlein Critique, Exhibit 1, p. 27).

The analyses in Dr. Leslie's report also did not take into consideration the major differences in costs which result from institutions have different proportions of students at the lower division, upper division, masters and doctoral levels. (Schmidtlein Critique, Exhibit 1, pp. 27-28).

Dr. Leslie also defended the importance of economies of scale based on purely theoretical grounds and without examining actual evidence on economies of scale among Louisiana institutions. (Schmidtlein Critique, Exhibit 1, pp. 28-29).

Dr. Leslie's failure to take into consideration the most basic factors causing cost differences in his March 23, 1981 report make its conclusions largely a matter of conjecture. (Schmidtlein Critique, Exhibit 1, pp. 29-30).

A difficult issue to address in a cost study concerns the extent to which the current conditions of an institution result from funding practices and the extent to which they result from management practices. Dr. Leslie's March 23, 1981 report neglects to analyze this critical issue, leaving the reader with the impression that all ills result from funding practices. To the extent the condi-

tions of institutions result from factors other than funding, then an analysis implying funding is the root cause is likely to divert attention from the real source of problems and, as a result, frustrate finding effective remedies. (Schmidtlein Critique, Exhibit 1, p. 37).

With respect to the formula in effect in 1981, Dr. Schmidtlein opined that "[state] monies are being equitably allocated to the best of one's ability through formula process." Moreover, Louisiana's formula has a mechanism permitting institutions to request special funds outside of the formula to deal with unique problems. Finally, contrary to Dr. Leslie's charge, the Louisiana formula did not hold the predominantly black institutions where they were, but provided catch-up money. (Deposition of Dr. Frank A. Schmidtlein, May 28-29, 1981, pp. 88-89; Schmidtlein Critique, Exhibit 1, pp. 44-45).

141. Denied. (1) The Board of Regents has annually recommended the formula be funded at 100% (2) Special requests are reviewed on an individual case basis-some of the non-formula items are mandated by statute. (3) Non-formula Consent Decree recommendations for Southern and Grambling have resulted in larger percentage increases to those schools than the PWIs. (Roubique Affidavit, Par. 5).

142. Denied. While it is fact that state appropriations are higher at LSU than at Southern, it is fallacious to compare the funding at a SREB Doctoral I institution to a SREB Master's II institution. The two should not be compared. Comparison should be made between institutions which are in the same group. For example, Nicholls State University and Southern are in the same group—currently Master's II. In 1978-79 Southern received $2,097 per FTE student while Nicholls received $1,622; in 1985-86 Southern received $2,732 while Nicholls received $2,466. In 1978-79 the SREB average per student for Group III was $2,106 and for 1985-86 it was $3,427.

In both cases Southern is funded at a higher dollar amount than is Nicholls and is funded closer to the SREB average than is Nicholls. (Roubique Affidavit, Par. 8).

143. Denied. Southern received more state dollars per FTE student than did LSU for six of the eight years during the period 1978-79 through 1985-86, as reflected in Attachment A to the Roubique Affidavit. (Roubique Affidavit, Par. 9).

144. Denied. Lack of clarity for the term "accounting method modification" renders this statement unintelligible.

145. Denied. While collectively the state dollar increase per student was greater at all other Trustees' institutions for the period cited than at Grambling, it is also true that two of the eight institutions used in this collective comparison had dollar decreases. Further, for 1980-81 Grambling was funded at a higher dollar amount than all of the collective group except Northwestern; in 1981-82 Grambling was funded at a higher dollar per student than the collective institutions. When the funding for Grambling is compared to like SREB schools in Attachment B to the Robique Affidavit, it is seen that Grambling received more than Nicholls, McNeese, and Southeastern for both years cited. (Roubique Affidavit, Par. 10).

146. Denied. The formula has been revised to reflect the average state funding per FTE student in the SREB by category, *i.e.*, Doctoral I, II, III, Master's I, II, III, *etc.* A Louisiana institution's 100% is not changed to equate it to another Louisiana institution's 100%. Because of each institution's student body mix (different percentages of freshmen, sophomores, *etc.* to the total number of students) and curriculum mix (high cost/low cost offerings), the dollar per FTE even at institutions in the same SREB group will differ. (Roubique Affidavit, Par. 7).

147. Denied. Over the period of 1981 to 1987, the Regents have recommended the formula be fully funded, plus the Regents have recommended that Grambling and Southern receive additional funding under non-formula Consent Decree items. The legislature has not been able to fund the PBIs to the extent the PBIs would like; however, the attained funding level has caused the PWIs to receive little or no increases in state funding during this period. (Roubique Affidavit, Par. 6).

148. Denied. The state appropriations formula is goal-oriented to achieve the average state appropriations per FTE student in the SREB states. (Roubique Affidavit, Par. 2).

149. Denied. The formula treats all institutions alike. A freshman taking a history course at LSU generates the same dollar amount as a freshman student taking the same course at Southern. The funding per student between institutions will not be the same, in part because of the student mix, *i.e.*, the percentage of the student body who are freshmen, *etc.* Also, the courses (high or low cost) taken will cause a difference in the dollar per student. (Roubique Affidavit, Par. 4).

150. Denied. The formula recognizes differences in the cost of curricula both by discipline and student level, and not by institution. Even at 100% implementation there will be variances in dollar per FTE student between like institutions because of student body mix. (Roubique Affidavit, Par. 3).

151. Denied. The Board of Regents has no knowledge of funding prior to 1955. We are aware, however, that the formula treats all institutions alike. There currently would be disparate funding for the PWIs due to the sums which have gone to the PBIs during the Consent Decree. Any current disparity favors the PBIs and results from Consent Decree appropriations. (Roubique Affidavit, Par. 11).

FACILITIES

152. Denied. The Justice Department cites no particular section of Dr. Harvey Kaiser's lengthy June 1981 report to support this broad allegation, which is a legal conclusion and not a statement of fact. Dr. Kaiser's 1981 report cannot be cited as support for an allegation of present day disparities. His report was completed prior to the capital outlay program undertaken by the State of Louisiana pursuant to the Consent Decree, which substantially upgraded facilities at the predominantly black institutions.

In 1982, subsequent to Dr. Kaiser's report and pursuant to the Consent Decree herein, a panel of experts studied the nature and extent of deficiencies at the predominantly black institutions and identified capital outlay projects necessary to upgrade the physical plants at those institutions. In 1983, the Board of Regents adopted a five year capital outlay plan, which has been revised annually. A total of $34,213,375 has been appropriated and received by the institutions; and the Regents' capital outlay plan calls for the appropriation and expenditure of an additional $89,831,316. (See Board of Regents' Statement of Facts, Par. 31(h)(ii) and page 7 of Attachment Two of the affidavit of Douglas H. Rewerts, Assistant Commissioner of Higher Education for Facility Planning, Board of Regents of the State of Louisiana, attached hereto.)

Therefore, conditions of the facilities at the predominantly black institutions are far different today than at the time of Dr. Kaiser's report.

Moreover, Dr. Kaiser's decision to compare geographically proximate institutions is inappropriate and unsupported by any authority. Dr. Kaiser's only justification for the "pairing" of institutions on a geographic basis was his own time limitations:

> . . . The pairing results from the geographical proximity of the eight institutions with a tradition-

> ally white and traditionally black campus in close proximity to each other in the four communities.
>
> Although the institutions vary in enrollment, missions and dates of founding, they represent the diversity of the state's system of public higher education. Also affecting the selection of institutions were practical limitations of time available for review of data and site inspections for each campus.

Kaiser report, page 1-1.

The August 6, 1982 report of the Facilities Study Panel, entitled "A Study of the Physical Facilities at Facilities at Grambling State University, Southern University-Baton Rouge and Southern University-New Orleans," which was prepared for the Board of Regents pursuant to the 1981 Consent Decree herein, stated that standards of institutional comparison must begin with size of enrollment and institutional role and scope. *Id.*, page 3. Other factors considered by that panel include: profile of academic programs, age of physical plant, number of buildings and gross square footage, and secondarily, the relative proportion of residential students, daytime versus nighttime enrollment and full-time/part-time enrollment. *Id.*, page 3. On that basis the panel chose to compare Southern University-Baton Rouge with Northeast Louisiana University; Grambling with Northwestern; and Southern University-New Orleans with LSU-Shreveport. *Id.*, pages 4-6.

Dr. William Fuller, then the Executive Director of the Nebraska Coordinating Commission for Postsecondary Education and an expert in the study and comparison of facilities of higher education, was retained by the Board of Regents to conduct his own comparison of the facilities of certain of the institutions. Dr. Fuller testified in his May 27, 1981 deposition herein that the most significant factor in selecting institutions for comparison of needed facilities is the number of degrees offered and

awarded by the institutions, including advanced and specialized degrees, for the academic program offering determines the facilities needed. Fuller deposition, page 22. On that basis he chose to compare Southern University-Baton Rouge with the University of Southwestern Louisiana, and Grambling with Southeastern Louisiana. Fuller deposition, page 23 and pages 64-65.

Dr. Fuller testified that it was particularly inappropriate to compare Southern-Baton Rouge with LSU-Baton Rouge because of the great disparity in size and programs. Fuller deposition, pages 116-17. The August 6, 1982 Study of the Facilities Management Team stated that LSU-Baton Rouge, as the only "comprehensive university" in the Master Plan for Higher Education in Louisiana, is an inappropriate choice for comparison of facilities with any other institution in the state. Study, page 4. See also the references to Dr. Frank Schmidtlein's Critique in Response to Statement of Fact, Paragraph 132, supra.

153. The plaintiff miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 61.01 as authority for this allegation. That response read:

> Defendants admit that the authority for maintenance does rest with the various boards, but deny that said boards have authority for construction. Furthermore, all construction is first subject to the approval of the legislature and that the legislature must first appropriate the necessary construction funds.

154. Admitted.

155. Admitted, except that as to construction, see the qualification contained in Paragraph 153 above.

156. Admitted, except that as to construction, see the qualification contained in Paragraph 153 above.

157. Admitted.

158. Admitted.

159. Denied. This allegation is a sweeping conclusion of law devoid of any facts, or any reference to specific institutions. The referenced pages of Dr. Kaiser's report cited as authority contain no factual statements concerning conditions of facilities in 1955, but only the same broad generalizations. Further, as set forth in the Regents' response to number 152 above, a purported comparison of geographically proximate institutions is invalid.

160. Denied. Dr. Kaiser's 1981 report cannot support an allegation concerning present conditions. See response to Number 152, supra.

161. Denied, except to admit that the condition of facilities at traditionally black institutions has improved since 1955. Dr. Kaiser's 1981 report cannot support an allegation that disparities in the condition of facilities exist at present, and comparisons between proximate institutions are not valid. With respect to the allegation concerning the cause of facility conditions, both Dr. Kaiser and Dr. Fuller testified that the cause of poor building conditions is difficult to determine. Kaiser deposition, pages 53-54, page 56, and page 107; Fuller deposition, pages 93-94.

162. Denied. Dr. Kaiser's 1981 report and his 1981 testimony do not support this allegation concerning present-day disparities between institutions in Shreveport and New Orleans.

163. Denied. The plaintiff miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 64.00 as authority for this allegation without qualification. That response read:

> Defendants admit item 64.00 but aver that the purpose of said team was to visit the various campuses and observe the general condition of the facilities in view of each institutions' capital outlay recommendations. This exercise was not a detailed evaluation, but

rather was an observation, and the team was not a team of nationally recognized experts in the field.

164. Denied. Dr. Kaiser's 1981 report is not authority for the allegation that the Southern-Baton Rouge campus is presently in need of major remodeling and renovation. See response to Paragraphs 152 and 161.

165. Denied; see response to Paragraph 164 and Paragraph 152.

166. Denied; see response to Paragraph 164 and Paragraph 152.

167. Denied. 1981 data cannot support this allegation concerning present-day conditions. Moreover, with respect to comparisons of Southern-Baton Rouge and USL in 1981, Dr. Fuller testified in his deposition that USL had many ward type barracks residential buildings, and Southern did not. Fuller deposition, page 56. Also, Southern had more gross square feet of usuable space per student than USL, although the buildings were older at Southern. Fuller deposition, pages 69-70. Dr. Fuller testified that in terms of general appearance of grounds and general maintenance of academic buildings, the campuses were "about equal." Deposition, pages 79-80.

168. Denied. See response to Paragraph 167.

169. Denied, because Dr. Kaiser's 1981 report cannot support an allegation concerning the condition of facilities at LSU-Baton Rouge "at the present time."

170. Admitted.

171. Admitted.

172. Denied; the cited portions of Dr. Kaiser's report merely quote the report of the Regents' Facilities Inspection Team. Dr. Kaiser's statement is therefore inadmissable hearsay. Moreover, Dr. Kaiser only studied eight of the institutions in Louisiana and made no such conclusion concerning conditions of facilities at Grambling. And, of course, neither Dr. Kaiser's 1981 report nor the Inspection Team's 1980 report can support an allegation concerning present conditions.

173. Denied. See response to Paragraph 163 above. The massive rehabilitation and refurbishing program is well under way. See response to Paragraph 152, supra.

174. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 66.02 as authority for this allegation without qualification. That response read:

> Defendants admit Item 66.02, but aver that subsequent to said finding adequate funding was made available and a water system improvements project was initiated and completed which eliminated the problem.

See also the response to Paragraph 175.

175. The Justice Department miscites Defendants' Responses to Plaintiff's Pretrial Brief No. 66.03 as authority for this allegation, without qualification. That response read:

> Defendants admit item 66.03 but aver that since that time the state has appropriated the following sums for major renovations:

	Amount	Year
Renovations of Long Hall	$1,225,000	1978-1980
Installation of water tower and repairs to system	254,260	1978
Repairs to campus electrical and lighting systems	195,000	1978
Renovations to McCall Dining Hall	245,950	1978
*Emergency plumbing, hearing, a/c and roof repairs to academic bulidings	1,245,000	1978
*Major repairs to academic buildings	245,000	1978
*Repairs and renovations to utilities and buildings (master plan)	155,000	1978
*Major repairs and roof replacements to non-academic buildings	2,195,000	1979
*Major repairs and roof replacement	1,308,000	1979
Repairs to library	250,000	1980
	$7,348,210	

* These projects specifically address emergency work on campus in the priority established by Grambling.

Since 1981, $16,005,000 has been appropriated by the legislature for capital improvements at Grambling. Those funds have either been spent on, or are currently dedicated to, the capital improvements at Grambling which are enumerated at pages 1-2 of the documents captioned "Board of Regents Summary of Consent Decree Capital Outlay Funding through June 1, 1988," which is Attachment Two to the affidavit of Douglas H. Rewerts, submitted herewith. In addition, capital outlay funding totalling $8,185,000 is contained in pending House Bill 575 of the current legislative session, and an additional $16,853,369 in future appropriations are planned to complete the twenty-three capital projects undertaken by the State for new facilities and improvements to existing facilities at Grambling pursuant to the Consent Decree herein. See "Grambling Totals" on page 2 of Attachment Two to Mr. Rewert's affidavit.

176. Admitted, but see responses to Paragraphs 174 and 175 above.

177. Denied; see responses to Paragraphs 174 and 175 above.

178. Denied; see responses to Paragraphs 174 and 175 above.

179. Denied; defendant's 1981 responses are not authority for allegations concerning current conditions.

180. Admitted.

181. Denied; testimony from 1981 cannot be relied upon as authority for present conditions, and comparisons of geographically proximate institutions are invalid. In addition, the cited pages of Dr. Kaiser's deposition contain no reference to comparisons of the proximate institutions in Shreveport, and therefore do not support the broad allegations of the plaintiff in Paragraph 181.

182. Denied; see the response to Paragraph 179 above.

183. Denied; see the response to Paragraph 179 above. Moreover, at page 106 of his deposition (cited by plaintiff in support of its allegation), Dr. Kaiser denied that the quality of maintenance was poor at Southern University-New Orleans; he stated only that the quality of maintenance at the University of New Orleans appeared to be better than at Southern-New Orleans.

184. Admitted, with the qualification that seven years has passed since the statement was originally made and admitted, which may bear on the "relative newness" of the facility.

185. Admitted.

186. Denied; see response to Paragraph 179.

187. Denied; see response to Paragraph 179.

188. Admitted.

189. Denied as drafted; recommendations and conclusions of the 1982 facilities study are set forth in the report itself.

190. (a) Denied. The plaintiff asserts that there are eight projects for capital improvements at Southern University-New Orleans, listed by the Board of Regents, and seven by Southern University-New Orleans. In fact, the Board of Regents lists seven projects. Of those seven, one is complete; four are ready for bid; and two have not begun. See "Consent Decree Capital Outlay Status, Summary Report, 6-1-88," Attachment One to the affidavit of Mr. Rewerts. The current status of each consent decree capital project, for each institution, is listed in Attachment Two to Mr. Rewerts' affidavit.

(b) Denied. At Southern University-Baton Rouge, there are 28 projects agreed upon, not 27. Four projects are now completed; one project is partially completed; seven projects are ready to bid; and sixteen projects have not begun. Rewerts' affidavit, Attachments One and Two.

(c) Denied; except to admit that there are 23 capital projects agreed upon at Grambling. Of these, five are completed; nine are ready to bid; one is in the planning phase; and the remaining eight have not begun. Rewerts' affidavit, Attachment One and Two.

Significantly, Dr. Joseph B. Johnson, President of Grambling, has directly contradicted the plaintiff's assertion that only three of the Grambling projects have been completed. Paragraph 12 of Dr. Johnson's May 8, 1988 affidavit (submitted in support of the *plaintiff's* Motion for Summary Judgment) states that five of the capital projects are completed, the same number listed as completed by the Board of Regents.

The amount of capital funding available has dropped sharply in the last two or three years due to the State's fiscal crisis and resultant inability to sell bonds, which are the major source of such funding. See affidavit of Brian Kendrick, then-Commissioner of Administration, submitted herein on May 13, 1988, in support of the Regents' Motion for Summary Judgment. Attachment Four to Mr. Rewerts' affidavit is a graph showing the amount of capital outlay appropriations for higher education in relation to the total amount of state appropriations for capital funding. The proportion of decrease in each for the last three years is approximately the same, demonstrating that higher education is receiving generally the same relative percentage of the decreasing capital outlay appropriations.

191. Denied. In fact a disproportionately high percentage of capital outlay funding for higher education

during the years 1982-86 has been awarded to the predominantly black institutions. This is true whether the funding is analyzed on a "dollars per FTE (full-time equivalent student enrollment)" basis or "dollars per GSF (gross square feet)" basis. Dr. Kaiser's tortured analysis, which ignores capital improvements agreed upon in the consent decree, simply ignores reality. Consent decree capital projects constitute a high percentage of current capital projects in higher education. Most of the projects which are the subject of Dr. Kaiser's head-in-the-sand approach are projects which were begun prior to 1982 and nappen to be still in progress today. In addition, his analysis once again suffers from his insistence on comparing geographically proximate institutions with one another without regard to the nature of the institutions. It is not appropriate to compare expenditures in any category at the state's sole only comprehensive research university with expenditures at one of the state's senior universities.

The Board of Regents asserts that the analysis of capital expenditures which is most reflective of current priorities and expenditures is an analysis and comparison of capital projects initiated since 1982. Such an analysis was undertaken by Mr. Rewerts and described in Paragraph 4 of his affidavit. The results of his analysis are reflected in Attachment Three-A to his affidavit, and demonstrates, for example, that in 1984, the predominantly black institutions received 70% of such capital funding eevn though those institutions had only 13% of the full-time students (FTE) and 16% of the gross square feet of usable space of the total at state institutions.

192. It is admitted that a health and physical education multi-purpose building was recommended by the assisting agency and was not included in the Board of Regents' capital outlay plan in 1987. The remaining allegations are denied. Initial funding for that building is contained in the Regents' 1988-89 Capital Outlay Rec-

ommendations, as acknowledged by Dr. Joffre T. Whisenton, President, Southern University System, in Paragraph 8 of his May 12, 1988 affidavit submitted on behalf of the plaintiff. The Board of Regents avers that the construction of a health and physical education multi-purpose building on the main campus of Southern University-Shreveport/Bossier will not serve to attract white students to that campus. See affidavit and report of Dr. William Clark submitted herein in support of the Regents' Motion for Summary Judgment on May 13, 1988.

193. Admitted.

194. Admitted; the funds for leasing the off-campus instructional center were made available to Southern University-Shreveport some time prior to utilization of the funds. Numerous complications during the required public bidding process resulted in the project being bid several times before a contract was entered. Rewerts' affidavit, Paragraph 6.

Respectfully submitted,

/s/ Margaret Woodward
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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6th day of June, 1988, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States mail, properly addressed, and first class postage prepaid.

/s/ Margaret Woodward

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

MOTION FOR SUMMARY JUDGMENT BY DEFENDANT, BOARD OF REGENTS

The Board of Regents of the State of Louisiana, defendant in the above entitled action, hereby moves the Court, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, for summary judgment in favor of defendant, on the ground that there is no genuine issue of material fact, and that defendant is entitled to judgment as a matter of law.

This motion is based upon:

1. The Statement of Material Undisputed Facts submitted by the Board of Regents and Exhibits thereto:

2. The affidavit of Sharon Beard, Deputy Commissioner of Higher Education for the State of Louisiana, annexed to the Statement of Material Undisputed Facts as Exhibit 1 thereto;

3. Chapter III of *The Master Plan for Higher Education in Louisiana*, April, 1978, Board of Regents, annexed to the Statement of Material Undisputed Facts as Exhibit 2;

4. The affidavit of Brian Kendrick, Commissioner of Administration for the State of Louisiana, annexed to the Statement of Material Undisputed Facts as Exhibit 4 thereto;

5. The affidavit of Dr. William A. V. Clark, Chairperson of the Department of Geography, University of

California, Los Angeles, annexed to the Statement of Material Undisputed Facts as Exhibit 5 thereto;

6. The affidavit of Dr. G. Wayne Brown, Dean of the Graduate School of Business, Belmont College, Nashville, Tennessee, annexed to the Statement of Material Undisputed Facts as Exhibit 6 thereto;

7. Excerpts from the deposition of Dr. Cameron L. Fincher, taken in the above entitled cause on June 4, 1981, which deposition is in the record. The excerpts relied upon are set forth in the Statement of Material Undisputed Facts;

8. Excerpts from the deposition of Dr. Roger Heyns, taken in the above entitled cause in April, 1981, which deposition is in the record. The excerpts relied upon are set forth in the Statement of Material Undisputed Facts;

9. The Complaint and Amended Complaint of the plaintiff United States of America in this proceeding; and

10. The Answer of the defendant Board of Regents in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for each party of this action, by hand delivery or express mail, this 13th day of May, 1988.

/s/ Mack E. Barham

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

BOARD OF REGENTS'
MOTION FOR SUMMARY JUDGMENT

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GLOSSARY

ACT	American College Test
BPCC	Bossier Parish Community College
CDMC	Consent Decree Monitoring Committee, composed of two representatives from each management board, two from the Board of Regents, and a Chairman appointed by the Governor, and assigned the responsibility of overseeing implementation of the Consent Decree
Delgado	Delgado Community College
FTE	Full-time equivalent—a statistical means of multiplying student credit hours so that all students, including students carrying less or more than a full load, are translated into full-time equivalents, carrying a standard load
Grambling	Grambling State University
HEGIS	Higher Education General Information System—U.S. Department of Education-sponsored data base, reflecting various data for higher education
LSU-A	Louisiana State University-Alexandria
LUS-BR	Louisiana State University-Baton Rouge
LSU-E	Louisiana State University-Eunice
LSU-MC	Louisiana State Medical Center
LSU-S	Louisiana State University-Shreveport

Louisiana Tech, La. Tech, or Tech	Louisiana Tech University
McNeese	McNeese State University
Nicholls	Nicholls State University
Northeast	Northeast Louisiana State University
Northwestern	Northwestern State University
Other-Race	Refers to blacks in the case of PWIs and whites in the case of PBIs
Predominantly Black Institutions or *PBIs*	Refers in Louisiana to each of the following: Grambling State University, Southern University-New Orleans, Southern University-Baton Rouge, and Southern University-Shreveport/Bossier Parish
Predominantly White Institutions or *PWIs*	Refers in Louisiana to each of the following: Louisiana Tech University, University of Southwestern Louisiana, McNeese State University, Nicholls State University, Northeast Louisiana State University, Southeastern Louisiana State University, Northwestern State University, Louisiana State University-Baton Rouge, the University of New Orleans, Louisiana State University-Shreveport, Louisiana State University-Alexandria, Louisiana State University-Eunice, Paul M. Hebert Law Center (LSU), Louisiana State University Medical Center (New Orleans and Shreveport), Delgado Community College, and Bossier Parish Community College

Proximate Institutions	Refers to the following groupings of geographically proximate institutions: UNO and SUNO; LSU-BR and SU-BR; Louisiana Tech and Grambling
SCH	Student credit hour
SREB	Southern Regional Education Board
SSPS	Statewide Student Profile System—a student record-driven data base, reflecting 14 class day enrollment for fall and spring semester
SUBR	Southern University-Baton Rouge
SUNO	Southern University-New Orleans
SUSBO	Southern University-Shreveport/Bossier City
Southeastern	Southeastern State University
UNO	University of New Orleans
USL	University of Southwestern Louisiana

1/B14/D/10

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

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versus

STATE OF LOUISIANA, *et al.*

MEMORANDUM IN SUPPORT OF BOARD OF REGENTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

That Louisiana once maintained a *de jure* segregated system of public higher education is undisputed. That the racial identifiability of Louisiana's public colleges and universities persists today is also undisputed. The controversy in this action revolves around the proper means of achieving a racially integrated system.

In elementary and secondary education, desegregation can be accomplished by *fiat*. Local school authorities have the power to control the student mix by ordering certain students, whose attendance is compulsory, to attend certain schools. In public higher education, students are free to choose whether and for how long they will participate, and where they will go. Because they cannot be forced to attend any institution, integration must be accomplished by inducement.

For many years, the state has implemented racially nondiscriminatory policies and practices, and has further

taken affirmative steps to promote integration. However, by 1981 such measures had failed to achieve a fully integrated system of public higher education because students continued to make choices that maintained the racial identity of many institutions. The failure to accomplish the desired results raised the question whether the state had done enough. While vigorously asserting that it had, the state determined to put all such questions to rest. It therefore agreed to enter into the Consent Decree, a comprehensive plan embodying all the conventional wisdom on eradicating the vestiges of a dual system of public higher education. The Consent Decree was approved by this Court on September 8, 1981, after all parties had adopted it. A subsequent Addendum extended the plan's application to the Caddo-Bossier Parish area.

For more than six years now, the state has been operating under the Consent Decree. Every institution of public higher education, every management board, the Regents, the legislature, and two successive governors of the state have worked diligently to implement its programs, which have touched upon every aspect of public higher education. Substantial and broad-based efforts have touched upon every aspect of public higher education. Substantial and broad-based efforts have been devoted to recruitment of students and faculty, to faculty and student exchange programs, to cooperative programs and arrangements between proximate institutions, to curbing programmatic duplications that might negatively affect enhancement of the predominantly black institutions, and to monitoring and reporting such efforts.

No dollar value can be assigned to such an endeavor, involving, as it has, so many individuals throughout the state, who have dedicated their time, thought, and energy to the implementation of the Consent Decree. But the state's commitment has not ended there. Over the past six years, the Louisiana legislature has appropriated and

sold bonds for *$34.2 million* for capital improvements required by the Consent Decree at the state's predominantly black institutions; it is committed to the expenditure of another *$90 million* for Consent Decree capital projects. The state has additionally expended more than *$65 million* in funds *supplementing* the formula funding for new academic programs at the predominantly black institutions; the Board of Regents has recommended more than *$16 million* in supplemental funds for predominantly black institutions in 1988-89; and the state is committed to continuing such funding in the future, although the proper amounts and duration are in dispute. In addition, for six years, the state *annually* appropriated *$1 million* in general enhancement funds to its predominantly black institutions and provided *millions* more to support faculty development at those institutions and a host of minority scholarships.

These expenditures have resulted in a tremendous enhancement of the state's predominantly black institutions. But enhancement has not produced the predicted influx of white students to predominantly black campuses. To the contrary, it has resulted in an alarming movement of black students away from the predominantly white institutions and into the predominantly black institutions. With slightly increased enrollment statewide, black students are choosing in increasing numbers to attend predominantly black institutions; and there has been no significant increase in white enrollment in most of those institutions. Thus, the Consent Decree has been an abysmal failure at its intended purpose.

The failure of the Consent Decree's programs to promote its stated goals could not be expected to satisfy the Justice Department, nor could it persuade the predominantly black institutions to relax their court-sanctioned grip on the huge supplement of funds they have received under the Decree. Their desire to see the Consent Decree and the wealth it has brought to their campuses

maintained and extended is particularly acute because of the state's fiscal crisis. Formula funding, the method by which the state equitably distributes monies among all of its public institutions of higher education, has been critically curtailed in recent years. Therefore, merely fair treatment would amount to substantially reduced funding for the predominantly black institutions. The Consent Decree has elevated them far above the funding levels suffered by comparable predominantly white institutions, and they are understandably reluctant to relinquish the advantage.

Thus, the parties have returned to this Court more divided than they were before the Consent Decree was adopted. The Justice Department, joined by the state's predominantly black institutions, charges that the Consent Decree has not succeeded because the state has not carried out all of its obligations under the Decree, particularly its obligations to enhance the predominantly black institutions. It is a charge that falls hard on a state that has spent so much on enhancement at a time when it could ill-afford to do so. Moreover, because the Consent Decree has not promoted integration, the only possible argument for maintaining or extending its enhancement provisions is an argument for separate but equal treatment, or separate but better-than-equal treatment of the predominantly black institutions. Whatever the merits of such an argument may be, this litigation, grounded in Title VI of the 1964 Civil Rights Act and the Fourteenth Amendment, is not the proper forum for it. Enhancement, however, is the remedy the Justice Department and the state's predominantly black institutions are pursuing in this litigation. Behind every assault on the state's efforts is a suggestion that more money for the predominantly black institutions could cure the ills of the past. Yet the notion that a policy which, in limited application, has produced negative results will produce positive results if fully implemented is patently fallacious.

What the Consent Decree experience has demonstrated to the Board of Regents is that the task of eliminating racial segregation is a more difficult challenge than anyone had originally anticipated. But the challenge is one that the state must be free to meet on its own. This is so for two equally salient reasons. The first is that the State of Louisiana has carried out a vigorous affirmative effort to establish a unitary system of higher education. The Justice Department cannot establish, either by Motion for Summary Judgment or through a full-blown trial, that Louisiana has done less than the law requires. In fact, the State has done much more. If this Court is to hold the State liable, it cannot be because the state's tremendous efforts toward desegregation have been inadequate. Rather, this Court could only impose liability by disregarding the state's performance altogether, looking solely to the racial mixture of students in public institutions of higher education, and holding the state strictly liable for the persisting duality. Such an approach, taken in elementary and secondary education cases where state agencies can control the racial mix, has no proper application in a higher education case. Furtherfore, its application could have only one possible result: a radical remedy. If a comprehensive scheme of affirmative measures does not satisfy the requirements of the law where they do not bring about integration quickly enough, the only possible solution, since college students cannot be moved involuntarily, would be a radical restructuring of the institutions themselves.

This brings us to the second reason why the court should not intervene in this case. No court, no matter how wise, well-intentioned, or well-advised, can properly design, or redesign, a system of public higher education, whose complexities of role, mission, facilities, program offerings, faculties, student needs, and much more, daily challenge the hundreds of knowledgeable and capable experts assigned to the task. This Court has adverted on

occasion to the Tennessee case, *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986), in which restructuring was brought about by court order. What was attempted there was an institutional revision so limited in scope and so controversial in result that its use as a model for the reworking of Louisiana's entire system of public higher education is a horrifying prospect. *Geier* has taught that the goal of desegregation may elude even the most radical of measures. The Regents' grave fear is that it may be far easier to damage the system than to integrate it, and that the pursuit of integration should not be carried out at the expense of educational quality. These are complementary goals when pursued at a measured pace, and they should not be rendered incompatible by a forced march toward integration.

The Board of Regents and the State of Louisiana have demonstrated through affirmative actions their commitment to the establishment of a unitary system of higher education. It is a commitment they will uphold with or without court intervention. It is a commitment which the Consent Decree has proven cannot be fulfilled in a day, or a year, or even in six years. The state, which has done more than the law requires of it, should be left to continue on its measured course, for the sake of its institutions and for the sakes of students of all races.

II. THERE ARE FUNDAMENTAL DIFFERENCES BETWEEN HIGHER EDUCATION, ON THE ONE HAND, AND ELEMENTARY AND SECCONDARY EDUCATION, ON THE OTHER

Public elementary and secondary schools are traditionally free and compulsory. Prior to "freedom of choice," children were assigned to their respective schools. This could be done with equanimity because, in principle at least, one school for a given grade level is substantially similar to another in terms of goals, facilities, course offerings, teacher training and salaries, and so forth.

Alabama State Teachers Association v. Alabama Public School & College Authority, ("ASTA"), 289 F.Supp. 784, 787-88 (M.D. Ala. 1968), *aff'd mem.*, 393 U.S. 400 (1969) (direct quote).

Higher education is neither free nor compulsory. Students choose which, if any, institution they will attend. In making that choice they face the full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements, perhaps only to mention a few. *Id.* at 788 (direct quote) (See Statement of Material Undisputed Facts, hereinafter "Facts", Paras. 7, 8). A special emphasis is placed upon the relative uniqueness of the separate institutions comprising a public system of higher education. Indeed, the uniqueness of institutions which results from the confluence of course offerings, services, size, location, faculty and students found at each instittuion, explains why freedom of choice is so valued. *Ayers v. Allain*, 674 F.Supp. 1523, 1554 (N.D. Miss. 1987) (See Facts, Para. 31(i)). Freedom to choose where one will attend college, unlike choosing one's elementary or secondary public school, has a long tradition and helps to perform an important function, *viz.*, fitting the right school to the right student. *ASTA* at 790. (direct quote).

III. THE DIFFERENCES BETWEEN PUBLIC HIGHER EDUCATION AND ELEMENTARY/SECONDARY EDUCATION COMPEL DIFFERENT APPROACHES TO DESEGREGATION

At a minimum, a state offering public higher education has the duty to adopt and implement in good faith racially nondiscriminatory policies and practices. Black applicants must be admitted "under the rules and regulations applicable to other qualified candidates." *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413, 414, 76 S.Ct. 464, 465 (1956); *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848 (1950); *Missouri ex rel. Gaines v. Canada*, 305

U.S. 337, 59 S.Ct. 232 (1938). In a state like Louisiana, where a racially dual system was previously established by law, the duty goes farther: the state has an affirmative obligation to dismantle the dual system by reforming the policies and practices that maintained it. *Milliken v. Bradley*, 433 U.S. 267, 290, 97 S.Ct. 2749, 2762 (1977). *See, also, Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1275 (1971). Although the Supreme Court has not addressed the issue, it has been generally accepted that the affirmative duty to dismantle a racially dual structure applies in the public higher education context. *See, e.g., Ayers v. Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987); *United States v. Alabama*, 628 F. Supp. 1137 (N.D. Ala. 1985), *reversed on other grounds*, 828 F.2d 1532 (11th Cir. 1987); *Grier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979); *Norris v. State Council of Higher Education*, 327 F. Supp. 1368 (E.D. Va. 1971) (three-judge court), *aff'd sub nom., Board of Visitors of the College of William & Mary v. Norris*, 404 U.S. 907, 92 S.Ct. 227 (1971).

In the context of elementary and secondary education, the scope of the affirmative duty is clear: the state must take measures "which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools." *Green v. School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689 (1968). Thus, *Green* struck down, as inadequate, a "freedom-of-choice" plan that had failed to alter appreciably the racial identifiability of the schools involved. *Green* and its progeny commanded results in the form of racial mixture. For elementary and secondary education this was a reasonable mandate. The authorities who had established racial dualism by direct assignments of faculty and students could as readily disestablish it by reassigning faculity and students. Student compliance was assured by the compulsory attendance requirements, and movement from one school to another sharing fungible

characteristics posed no threat to the students or to the school system.

For public higher education, where attendance is not compulsory and diversity has been carefully developed to enrich student choice, *Green* has no easy application. In cases where *Green* has been applied to higher education, the courts' only means of forcing a rapid change in the racial composition of institutions was to restructure them. *See, e.g., Geier v. University of Tennessee, supra; Artis v. Georgia Board of Regents*, No. 479-251 (S.D. Ga. Feb. 2, 1981). As discussed more fully in Section IV *infra*, the *Geir* and *Artis* plans have been widely condemned in the academic community. Not only did they fail to promote the intended racial intermixture of students, they failed at the expense of educational quality.

Recognizing the fundamental differences of higher education, and perhaps because of the disappointing results achieved in *Geir* and *Artis*, an emerging line of cases has rejected the *Green* approach for public higher education. *ASTA*, which was quoted at length in the preceding section, is the seminal case in defining the state's affirmative duty to disestablish a formerly dual system of public higher education. The case arose out of Alabama's decision to construct a four-year, degree-granting extension of Auburn University (predominantly white) in Montgomery, Alabama, where Alabama State University (predominantly black) was located. The plaintiffs, students, alumni, and teachers of ASU, attempted to block construction, urging that the state was under an obligation to utilize new construction or expansion of facilities as an opportunity to dismantle its dual system. The three-judge court judicially noted that Alabama had had a *de jure* dual system, found as a matter of fact that the dual system had not been fully dismantled, and ruled that the state was under an affirmative duty to dismantle the dual system. However, it considered and rejected the argument that *Green* prohibited a desegregation plan that

would rely upon freedom of choice to effect integration. At the heart of the court's analysis was the recognition that *Green* could not be applied to higher education without abrogating the state's educational decisions. Writing for the panel, Judge Johnson observed:

> Plaintiffs fail to take account of some significant differences between the elementary and secondary public schools and institutions of higher education and of some related differences concerning the role the courts should play in dismantling the dual systems. Public elementary and secondary schools are traditionally free and compulsory. Prior to "freedom of choice," children were assigned to their respective schools. This could be done with equanimity because, in principle at least, one school for a given grade level is substantially similar to another in terms of goals, facilities, course offerings, teacher training and salaries, and so forth. In this context, although reluctant to intervene, when the Constitution and mandates from higher courts demanded it, we felt that desegregation could be accomplished, and that the requirements of the law would be met, without our being involved in a wide range of purely educational policy decisions. . . .
>
> Higher education is neither free nor compulsory. Students choose which, if any, institution they will attend. In making that choice they face the full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements, perhaps only to mention a few. From where legislators sit, of course, the system must be viewed on a statewide basis. *In deciding to open a new institution or build a branch or expand an existing institution, and in deciding where to locate it, the legislature must consider a very complicated pattern of demand for and availability of the above-listed variables, including, also, impact on*

> *the dual system. We conclude that in reviewing such a decision to determine whether it maximized desegregation, we would necessarily be involved, consciously or by default, in a wide range of educational policy decisions in which courts should not become involved.*

289 F. Supp. at 787-88 (emphasis supplied).

The court therefore concluded that the scope of the affirmative duty to dismantle a dual system should not be extended so far in higher education as it had been in the elementary and secondary public schools area. 289 F. Supp. at 787. Instead, it found that "as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level, to the extent that the system may be based upon racial considerations, is satisfied." 289 F. Supp. at 789-90.

In summarily affirming the decision of the three-judge panel, the Supreme Court clearly approved the rejection of *Green* as the standard for public higher education. *See* dissenting opinion by Justice Douglas, stating that the full duty imposed upon elementary and secondary education should be imposed upon higher education. 393 U.S. at 400. The High Court reaffirmed its position in *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000 (1986). *Bazemore* found no constitutional violation in the continued existence of racially segregated 4-H and Homemaker Clubs, which had been racially segregated by law prior to 1965. *Green's* condemnation of freedom of choice plans had "no application to this wholly different milieu," said the Court, because "while School Boards customarily have the power to create school attendance areas and otherwise designate the school that particular students may attend, there is no statutory or regulatory authority to deny a young person the right to join any Club he or she wishes to join." 478 U.S. at ——, 106 S.Ct. at 3013.

In the "wholly different milieu" of non-compulsory educational activity, the Constitution required only "discontinu[ation of] prior discriminatory practices and . . . adopt[ion of] a wholly neutral admissions policy." *Id.*

Bazemore's holding echoes its earlier recognition of "a vast difference—a constitutional difference—between" state-imposed racial bars and racial identifiability continuing on account of individual choice. *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641, 70 S.Ct. 851, 853-54 (1950). Even in the elementary/secondary school context, school authorities are not asked to countermand student choice. Thus, where housing and residential changes undermine desegregation efforts based on attendance zones, courts have not required further remedial action. "Changes in neighborhood ethnicity taking place after school officials have transformed their system into a unitary one need not be remedied, of course, for school officials are under no duty to adjust for the purely private acts of those who chose to vote with their feet." *Davis v. East Baton Rouge Parish School Board*, 721 F.2d 1425, 1435 (5th Cir. 1983). As the *ASTA* court observed student choice is essential to fit the right school to the right student. 289 F. Supp. at 790.

Student choice has sometimes proved doggedly immune to a state's affirmative desegregation efforts. This has been the case in Louisiana, as will be discussed *infra*, and also obtained in *Artis v. Georgia Board of Regents*, *supra*. *Artis* involved two proximate institutions of higher education, one predominantly black and one predominantly white. They had been operated for two years under an HEW-approved plan which provided for faculty transfers, a joint continuing education program, elimination of some duplicative courses, student scholarships, improvement of the physical plant at the predominantly black campus, and other recruitment measures. In 1981, the court found these efforts had had "comparatively little impact on the nature of the two institutions." The plain-

tiffs argued that the court should promote desegregation of both schools by requiring a total end to duplication in their program offerings. Memorandum Decision, p. 5. However, the court found that even where duplication had been ended, most students had not chosen to follow their educational interests to a school where they would be in a racial minority. Memorandum Decision, p. 5. While acknowledging that duplicative programs might have contributed to racial segregation, the court determined that "the overwhelming reason for the racial imbalances plaintiffs complain of is the individual decisions of students who are, after all, free to attend or not attend college where and when they choose." Memorandum Decision, p. 6. The students' choices, it found, were "based upon factors such as peer pressure, family ties, as well as educational and athletic opportunities." *Id.* Most choices were so strong that when programs were transferred from one institution to the other, 80% of the affected students refused to follow the programs and "simply went elsewere." Memorandum Decision, p. 9.

From this, the court concluded: "It appears then that the defendants have at best very limited capacity to alter student enrollment decisions, even when they follow the policies plaintiffs seek here." *Id.* As a matter of law, the court ruled in keeping with *ASTA* that the state satisfy the law by operating the institutions in good faith and it was not constitutionally required to take affirmative action to destroy the racial identities of the two institutions. Memorandum Decision, p. 8. The court ruled that the state's actions in adopting the HEW plan met the *ASTA* standards of good faith affirmative action.

Ayers v. Allain, supra, rendered after a five-week trial concerning the operation of Mississippi's senior colleges, also adopted the *ASTA* standard and exonerated the state of any liability. After a lengthy review of the foregoing authorities, the court ruled that *Green, Bazemore,* and *ASTA* "stand in harmony for the proposition that the

scope of the affirmative duty to disestablish a former *de jure* segregated system of educaton is to be defined in accordance with the degree of choice individuals enjoy as to whether they wish to attend the college at all and, if so, which one." 674 F. Supp. at 1553. With respect to higher education, the Court properly defined the state's duty as follows:

> In the college and university education context . . . where individuals have traditionally enjoyed free choice as to whether and when to attend school, the courts have considered it inappropriate to require state officials to maximize integration when assessing official action vis-a-vis the affirmative duty to disestablish a former *de jure* segregated system. . . . [T]he uniqueness of institutions which results from the confluence of course offerings, services, size, location, faculty and students found at each institution, explains why freedom of choice is so valued and why the courts have not required the restriction of student choice in higher education. *Thus, given that the state is not obligated to control student choice in fulfilling its duty to disestablish a former* de jure *segregated system of higher education, it would be inappropriate to emphasize the relative degree of integration of each institution in determining whether the state has satisfied its duty. While student enrollment and faculty and staff hiring patterns are to be examined, greater emphasis should instead be placed on current state higher education policies and practices in order to insure that such policies and practices are racially neutral, developed and implemented in good faith, and do not substantially contribute to the continued racial identifiablity of individual institutions.* (Citations omitted.)

Id. at 1554 (emphasis supplied).

The Mississippi court reviewed definition of institutional missions, establishment of admission standards,

policies in the area of programs, facilities, and funding, and recruitment and hiring policies in order to determine whether the state had adopted and implemented in good faith racially nondiscriminatory policies. It found a number of differences existing among the institutions but rejected the plaintiffs' assertion that such differences amounted to "disparities" reminiscent of the former *de jure* system," concluding instead that "such differences in programs, mission, facilities and funding are usually found, and are to be expected, within a system of higher education which includes eight institutions throughout the state." *Id.* at 1560. As in *ASTA*, the court refused to require that the state utilize the opportunity presented by definition of missions or expansion of educational offerings as a way to maximize the racial integration of institutions. *Id.* at 1561 and 1563. Also following *ASTA*, the court based its decision upon a recognition of the many interests and factors which confront decision-makers at the higher education level and which serve to counterbalance the desire to integrate each institution. 674 F. Supp. at 1559. In this regard, the court carefully heeded the Supreme Court's admonition that courts "are particularly ill-equipped to evaluate [academic decisions]" and that this consideration "warn[s] against any such judicial intrusion into academic decision-making." *Id.* at 1557 (quoting *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 92 (1978)).

The *ASTA/Bazemore* approach offers a sound means of insuring that no racial discrimination is at work in public higher education, without trenching upon the state's educational policy-making authority. To impose on higher education *Green*'s result-oriented standard of liability, developed in the elementary and secondary context where the power to achieve the desired results are readily at hand, would be unreasonable and inequitable when the same means are not available to higher education.

IV. THE *GREEN* APPROACH IS NOT APPROPRIATE OR WORKABLE FOR HIGHER EDUCATION

A. Application of *Green* to Public Higher Education is Inappropriate

In the elementary and secondary education context, *de jure* segregation was effected by the assignment of students and faculty, a traditional function of school authorities. It was not surprising that freedom of choice, a completely foreign element in that context, failed to produce integrative results. Absent some intervention, the system that had been put into place could be expected to continue and thus the authorities who had put it into place were responsible for its continuation. And when freedom of choice failed, it was fair and reasonable to require authorities to achieve desegregation by the same means through which they had historically operated segregated schools: by student and faculty assignment.

In higher education, students have never been assigned to institutions; student choice has traditionally determined the distribution of students among institutions. Segregation was effected by restricting student choice. Therefore, the allowance of free choice in selection offered and still offers a more realistic promise of desegregation than in the elementary and secondary school system. On the heels of the decision in *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753 (1955) (Brown II), the Supreme Court in reviewing the case of a black applicant denied admission to a graduate professional school, ruled that prompt admission was all that was required. *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413, 76 S.Ct. 464, *reh'g denied*, 351 U.S. 915, 76 S.Ct. 693 (1956). Commenting on an earlier remand in the case, the Court stated, "*We did not imply that decrees involving graduate study present the problems of public elementary and secondary schools.*" *Id.* at 413, 76

S.Ct. at 464 (emphasis supplied). In higher education, the "wholly different milieu" called for a different approach to desegregation. *Bazemore* is the only other post-*Brown* decision by the High Court addressing desegregation in higher education, and it reaches the same conclusion.

Louisiana has followed a policy of open admissions for many years. The student bodies of its public institutions of higher education have completely turned over every four years or so. Also, during that time the racial compositions of the institutions have shown marked change.[1]

With the passage of time and the significant gain in other-race enrollment at a number of the state's institutions of higher education, the presumption that the continuing numerical duality is the result of the former *de jure* system dissipates. Other intervening causes—social, geographic, and academic—must be examined.

The existence of racial imbalance, no matter how pronounced, is not a violation of Title VI or the Constitution. *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419-20, 97 S.Ct. 2766, 2775 (1977). Furthermore, the fact that racial imbalances were originally created or promoted by official acts in the distant past does not mean that the continued existence of such imbalance is attributable to these acts. *Artis v. Georgia Board of Regents*, Memorandum Decision at p. 4. For the state of Louisiana to be held accountable for current conditions, there must be current violations or a proven causal relationship between prior discriminatory acts and the current conditions.

There is substantial evidence that student choice is strongly influenced by a number of factors completely independent of state action or control. Dr. William Clark, Chair of the Department of Geography, University of

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[1] See Section VI, *infra*.

California, Los Angeles, explains that much of the separation that occurs in society by age, ethnicity, income, etc., results from differences in tastes and preferences. (Facts, Para. 53). Interestingly, "small incentives, almost imperceptible differentials, can lead to strikingly polarized results." Thus, even though blacks and whites might tolerate or even prefer integration the desire, shared by students of both races, to avoid minority status can produce great segregation: "[e]xcept for a mixture of exactly 50-50, no mixture would then be self-sustaining because there is none without a minority group status." (Facts, Para. 54). Contributing to this drive to avoid minority status are a number of economic, geographic, and social factors developed in some detail the report appended to Dr. Clark's affidavit. (Facts, Para. 53). For instance, he finds evidence that blacks are likely to select PBIs because of feelings that those institutions "are closer to the problems of blacks and have patterns for dealing with them" or have an "ambience [that] supports their personal development without the level of conflict that they may perceive would occur in predominantly white campuses." (Facts, Para. 56). These are matters of perception, which can only be altered slowly through informational activities and as blacks are successfully integrated into the PWI campuses. Dr. Clark also notes that blacks students are more likely than whites to be influenced by high school counselors and parental input. (Facts, Para. 55). The PWIs are reaching out to high school counselors and parents, but cannot dictate the advice they will give; and if black students are mistrustful of the PWIs, their concerns may not be alleviated by their parents whose exposure to them may be more limited.

Furthermore, it is difficult for public higher education to reverse the patterns that exist in the schools that feed them students. Racial segregation persists in many elementary and secondary schools throughout the state. The

Fifth Circuit has ruled that higher education cannot be made to "compensate for" or "remedy" constitutional infirmities existng at the elementary and secondary school level. *United States v. LULAC*, 793 F.2d 636, 649 (5th Cir. 1986).

With these external factors at work, there is no basis for imputing liability to the state because of the racial identifiability of its public institutions of higher education. *Green's* presumption that failure to achieve desegregation results from state action is inappropriate in the higher education context. What is reasonable and appropriate is the standard fixed by *ASTA and Bazemore*, requiring racially neutral policies and practices.

In Section VII, *infra*, we discuss at length the affirmative actions taken by the state which greatly exceed the requirement of nondiscrimination and racial neutrality.

B. The *Green* Approach Does Not Work For Higher Education

Although this motion addresses the issue of liability only, it is impossible to divorce the issues of liability and remedy in this case. Given the state's strong record of nondiscriminatory policies and practices and its affirmative action program, liability could only be premised upon the state's failure to achieve a greater racial intermixture of students. A finding of liability under *Green* could only produce a *Green*-like remedy, because no other measures are apt to result in the prompt movement of students that *Green* requires. But *Green* does not, and cannot, work in higher education.

In public higher education, the inability of state government to compel a student's attendance at any given institution means that the state cannot bring about a rapid movement of students without restructuring its institutions or shifing programs within those institutions. To understand the complexities of student choice,

addressed in the preceding section, is to understand the difficulty of influencing students' choices by altering the institutions.

The *Green* standard and remedy have been applied to the Tennessee system of higher education with dismal results. In 1968, several individuals sought an injunction to prohibit the University of Tennessee from expanding the facilities of its Nashville Center, arguing that the planned expansion of the identifiably white institution would be duplicative of the courses and services offered at Tennessee State University (named Tennessee A & I State University in 1968) and would adversely affect the desegregation of that predominantly black institution. The United States intervened in that action, seeking both the injunction and an order requiring the state defendants to submit a plan for the meaningful desegregation of the public institutions of higher education in Tennessee.

The district court found that "the dual system of education created originally by law has not been effectively dismantled." *Sanders v. Ellington*, 288 F.Supp. 937, 940 (M.D. Tenn. 1968). Relying principally upon *Green*, the court held that there is "an affirmative duty imposed upon the state by the Fourteenth Amendment to the Constitution of the United States to dismantle the dual sysem of higher education which presently exists in Tennessee." *Id.* at 942. The court refused to enjoin the construction of the proposed Center, but ordered the state defendants to submit "a plan designed to effect such desegregation of the higher educational institutions of Tennessee, with particular attention to Tennessee A & I State University, as to indicate the dismantling of the dual system now existing." *Id.*

The plan submitted by the defendants required the individual institutions within the system of higher education to increase the numbers of minority students and faculty. The plan provided that the University of Ten-

nessee-Nashville (UT-N) and Tennessee State University (TSU) would initiate joint faculty appointments, authorize the complete transfer of course credits from one institution to another, and avoid duplication of degree granting curricula. All plaintiffs objected to the plan and, after a hearing, the court found that the plan lacked specificity and ordered the defendants to file a report several months later detailing the implementation of each component of the plan.

The defendants' initial report noted a one-year increase of 42.2% in the number of black students enrolled in the predominantly white institutions but virtually no gain in the number of black faculty at those schools and virtually no progress in desegregating TSU, the only predominantly black institution in the Tennessee system. In June 1970, the private plaintiffs filed a motion for further relief. Prior to the hearing on that motion, the defendants filed an updated report which indicated, among other things, that the TSU student body was 99.7% black, and that the entering class in the fall of 1970 was 99.9% black.

The district court reiterated its conclusion that the state was under an affirmative duty to dismantle its dual system of education, and that the open-door policy, coupled with good faith recruiting efforts, had not been sufficient to dismantle the dual system. *Geier v. Dunn*, 337 F.Supp. 573 (M.D. Tenn. 1972). The court found that the traditionally white institutions were "proceeding to dismantle their dual system of higher education, taken as a statewide whole, at a constitutionally-permissible rate of speed." *Id.* at 580. With regard to TSU, the court ordered the defendants to develop a plan to provide for the desegregation of that institution's faculty and the allocation to TSU of programs to insure a substantial presence of white students.

Over the next few years, various plans were implemented under court supervision, but little change was

effected at TSU. In 1976, all plaintiffs, including the United States, proposed a merger of TSU and UT-N. The court acknowledged that "the remedy of merger is admittedly a radical remedy" but noted that "eight years under the state's method is proof that a stronger remedy is required. . . . Merger is a drastic remedy but the state's actions have been egregious examples of constitutional violations." *Geier v. Blanton*, 427 F.Supp. 644, 660 (M.D. Tenn. 1977). The court ordered that the two institutions be merged over a three-year period (ending in 1980) and placed the institution under the Board of Regents, the governing board for TSU and all state institutions of higher learning other than those in the University of Tennessee system. The merged institution retained the name TSU. The decision was affirmed in *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir.), *writ denied*, 444 U.S. 886, 100 S.Ct. 180, (1979).

The merger was completed in 1980, and an examination of the merged institution's role in the Tennessee higher education system is most instructive. Dr. G. Wayne Brown, who was Executive Director of the Tennessee Higher Education Commission from 1975 until 1985, was deeply involved in the desegregation effort in Tennessee, including the merger of TSU and UT-N. Dr. Brown has prepared a current study of the merged institution, which is incorporated as a part of his affidavit in this action, which is Exhibit No. 6 to the Regents' Statement of Material Undisputed Facts.

Dr. Brown began his analysis by enunciating the standard to which a successful merger should conform, as follows:

1. The mission of the merged institution includes the most important elements of the missions of the previous institutions.

2. The resources of the merged institution include those of the previous institutions.

3. The primary constituents of each of the previous institutions continue to be served by the merged institution at least as effectively as was the case prior to merger.

4. New constituents are served as needs arise.

5. The services and programs of the previous institutions are continued with at least the same level of quality as occurred prior to merger.

Further, in a particular case of merger whose purposes include the expectation of achieving additional desegregation, the following condition must be added:

6. The prescribed racial goal is attained.

(Brown Report, p. 2; Facts, Para. 68).

Dr. Brown then examined the performance of the merged institution with respect to each criterion, based upon his personal knowledge and upon information, including statistical data, available from the Tennessee Higher Education Commission and used by all public institutions in Tennessee. (Brown Affidavit; Facts, Para. 68).

Dr. Brown concluded that the merged institution successfully complied with the first two of the listed criteria, that is, the mission of the merged institution includes the most important elements of the missions of the previous institutions, and the resources of the merged institution include those of the previous institutions. The merged institution has all the faculty, student and physical resources of the two previous institutions, and it is the best funded university in Tennessee on a per-student basis. (Brown Report, p. 5; Facts, Para. 69).

However, the merged institution has failed to comply with the remaning criteria for a successful merger. First, enrollment data for the merged institution and for other area institutions establishes that the merged institution

is not serving the primary constituents of each of the previous institutions as effectively as was the case prior to merger. The merged institution has lost significant enrollment, including losses in total enrollment and both black and white enrollment. From the year prior to merger to the present, statewide public university enrollment declined 6.9%, but TSU enrollment declined 36.8%. By contrast, two state universities just outside Nashville, Austin Peay State University and Middle Tennessee State University, gained 11.1% in enrollment during the same period. Statewide (excluding the Nashville area), black student enrollment in public universities grew by 12.2%, while TSU lost 15% of its previous black enrollment, and the two state institutions just outside of Nashville (APSU and MTSU) gained 43.2% in black enrollment. In addition, two of the six Nashville private institutions which offer some programs similar to TSU's grew sgnificantly during the same time period, even though statewide Tennessee private university enrollment was stable. (Brown Report, p. 6 and attachments 5, 6, and 7 thereto; Facts, Para. 70).

TSU's 36.8% decline in enrollment from the pre-merger level also establishes that, to date, the institution has not met the fourth listed criterion for a successful merger, that is, that new constituents are served as needs arise. During the same time period that TSU's enrollment declined 36.8%, the Nashville metropolitan area and the state of Tennessee recorded gains in population. (Brown Report, p. 7; Facts, Para. 71.).

Dr. Brown's report cites three studies which indicate that the services and programs of the merged institution are not providing the same level of quality as occurred prior to merger, which is the fifth criterion by which the success of the merger is measured. For example, TSU's percentage of full-time freshmen who subsequently earned a baccalaureate degree within six years after enrollment was approximately 30% lower than such rates for other state universities in Tennessee for both black and white

students. (Brown Report, p. 5 and attachment 11 thereto; Facts, Para. 72).

Finally, student enrollment data demonstrates that desegregation, the purpose of the merger, has not been achieved even after seven years of operation as a merged institution. September 1987 enrollment data indicates that student enrollment at the main TSU campus is 75.1% black and student enrollment at the so-called downtown (former UT-N) campus is 51.3% black. (Brown Report, p. 9 and attachment 14; Facts, Para. 73). In 1984, more than three years after the merger was completed, the district court in Tennessee noted, "(i)t is obvious the phenomenon of a black TSU still exists and, . . . it still negates the contention that the dual system has been dismantled." *Geier v. Alexander*, 593 F.Supp. 1263, 1266 (M.D.Tenn.1984).

In summary, the results of the Nashville experience are that the merged institution has declined more than 36% in overall enrollment, including decline in both white and black enrollment, without achieving meaningful desegregation or maintaining the previous level of educational quality, while contributing to a huge increase (43.2%) in black enrollment in other area public institutions.

The dismal results of the Nashville merger should not be replicated in Louisiana.

Experience has taught that merger provides no easy solution. And experience has merely confirmed what we know about the strong role racial preference plays in student choice. The difficulties experienced in Georgia and Tennessee are explained by Dr. Clark's comments on the "white flight" which resulted from forced integration in elementary and secondary schools:

> Naturally, the issue of racism is raised. For while some commentators have viewed white flight as a form of racism and while there may, in some instances, be prejudice involved, both the direct and

indirect evidence argues against any reliance on a racist argument. First, over the past twenty years there has been considerable improvement in racial and ethnic tolerance among whites and this has been reflected in a number of surveys. Even though there is increasing endorsement of school integration, whites are opposed to mandatory reassignment and combination of school systems and have not changed that view in national surveys over the last twenty years. Moreover, the opposition to forced reassignment is strongest among white groups who have led the trend of increasing tolerance including college students, younger parents, and those scoring low on traditional prejudice indices. *Research evidence suggests that it is not school assignments or integration per se that whites object to but rather the methods used to achieve it and the combinations of racial proportions that are involved. Research from the Los Angeles school district shows that white losses are related more to issues of academic achievement in the receiving schools than the percent minority per se. The achievement level of the minority school is a critical variable in the decision of white parents to send their children to predominantly minority schools. While we cannot predict the magnitude of white loss, that there would be loss is without doubt.*

Clark Affidavit (citations omitted) (Facts, Paras. 57, 58).

A review of the ACT [2] class profiles for Louisiana's proximate institutions of public higher education offers

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[2] There has been considerable debate about the use of ACT scores as a measure of a student's ability or likelihood of success in higher education. However, in the attrition study conducted under the Consent Decree, there has been a significant correlation between ACT scores and attrition, and these scores are used by all public institutions of higher education as a screening tool for determining a student's need for remedial education. (Facts, Paragraph 48).

some important insights into the problems of merger. While the enrollments at Louisiana's predominantly black institutions have increased and those at the predominantly white institutions have decreased, the ACT profiles have shown little change over the past seven years. In 1987-88, the mean ACT score of Grambling's freshman class was 12.1, with 70% of the class scoring 15 or below. At proximate Louisiana Tech, the mean score was 18.8, with more than 75% of the class scoring 16 or higher. In the freshman class at Southern University-Baton Rouge, the mean ACT score was 12.7 with 67% scoring 15 or below. At proximate Louisiana State University-Baton Rouge, the mean score was 19.8 and more than 80% of the class scored 16 or above. At Southern University-New Orleans, the mean score was 10.7 and nearly 85% of the class scored at 15 or below. At proximate University of New Orleans, the mean score was 17.2 and nearly 70% of the class scored 16 or higher. (Facts, Para. 47).

Overall, the seven point difference in mean scores between proximate predominantly black and predominantly white institutions marks a substantial difference in students' college preparedness and the need for remediation at the college level. This is borne out by the figures on student participation in developmental education courses. (Facts, Para. 50).

The participation, by race, of firsttime freshmen in developmental education at the state's proximate institutions of public higher education is as follows:

	Black		White		Other		Total	
	#	%	#	%	#	%	#	%
Grambling	953	83.7	19	86.4	8	80.0	980	83.7
Tech	145	41.0	492	29.0	10	31.3	647	31.1
LSU	321	65.1	1802	46.9	43	18.9	2166	47.5
SUBR	1450	74.0	5	11.1	23	52.2	1478	72.1
SUNO	307	86.5	6	15.0	16	66.7	329	78.5
UNO	424	87.6	918	53.8	130	60.7	1472	61.2

(Facts, Para. 50).

The wholesale movement of these students into merged institutions, assuming (unsafely) that students *would* move, would necessarily bring about one or both of two changes: the academic characters of the merged institutions would be different from either of the proximate counterparts; or, in the absence of a strong remedial program at the merged institutions, a tremendous loss of students would follow. Additionally, the forced and sudden integration of racially imbalanced student bodies could, and probably would, provoke flight of both white and black students from the merged institutions. (Facts, Paras. 51, 52, 57, 58).

Dr. Roger Heyns, then Chancellor of the University of California at Berkeley, observed in his 1981 deposition in this action:

> Students scoring in the 10, 12 [ACT score] range are going to have real difficulties surrounded by students in the 17 to 20 range. And therefore, this kind of further desegregation plan has to take this into account. I don't regard the attainment of homogeneity cross on [sic] institutions as necessarily a desirable objective at a particular moment. . . . [I]f that range gets very large, you've got a real problem in organization and probably in overall institutional functioning. If that range is too large, you either have to have lots of remedial work or high attrition rate, something like that. . . . I think the important thing is to have right programs for the people who have those characteristics. And I think this means that encouraging movement of students from one campus to another, one has to take into account the overall level of preparation and the scholastic ability.

(Heyns deposition, Vol. II, pp. 59, 61; Facts, Para. 51).

Program transfer poses many of the same risks. In Georgia, as part of an HEW-approved desegregation plan, one program was transferred from each of the proximate

predominantly black and predominantly white institutions to the other. HEW had projected that 500 other-race students would follow each program to its new campus. Instead, only 114 white and 85 blacks transferred; 80% of the affected students "simply went elsewhere." *Artis v. Georgia Board of Regents*, Memorandum Decision at p. 9. The court properly read this result as demonstrating that "defendants have at best very limited capacity to alter student enrollment decisions, even when they follow the policies plaintiffs seek here." *Id.* The racial identities of the institutions remained constant and the court cited "the individual choice of students" as "the overwhelming reason." *Id.* at 10.

Dr. Cameron Fincher who, at the time of his deposition in this matter was director of the Institute of Higher Education of the University of Georgia, examined the desegregation efforts in Savannah as a part of a larger study of desegregation efforts funded by the Southern Regional Education Board (SREB). Fincher Deposition, pp. 48-49, 69).

Dr. Fincher testified in some detail regarding the programmatic mergers at the Savannah institutions and the problems which resulted.

> . . . In Georgia, the Board of Regents submitted a plan whereby there would be the program transfer, and education would . . . go to Armstrong State [the predominantly white institution]. Armstrong State would establish a school of education and appoint a dean of education, which they did. Business would be transferred to Savannah State [the predominantly black institution], and they would establish a school of business and appoint a dean of business.
>
> . . .
>
> . . . Both institutions in Savannah identified a potential pool of approximately five hundred students each. In other words, according to the people at

Savannah there were approximately five hundred education majors that might transfer to Armstrong State. And according to the people of Armstrong State there was a pool of approximately five hundred business majors that might transfer to Savannah State.

. . .

Okay, the actual number that turned up on each campus and was regarded as transfer was, as I recall, 126 students transferred from Savannah State to Armstrong State the first year. And I believe 96 or 98 students transferred to Savannah State. Both groups of students transferred with the understanding there would be a year of grace concerning the conferral of their degrees. In other words, the Armstrong State student taking course work on the Savannah State campus could still get the Armstrong State degree. The Savannah State student who transferred and became an Armstrong State student, if they finished within the first year, they would get a Savannah State degree.

Consequently, the transfers the following year, as I understand, were much less. The figure that comes to mind is 25 students transferring from Savannah State to Armstrong State, and I never did hear an accurate figure for the number of Armstrong State students that transferred to Savannah State the second year. The enrollments for both institutions dropped the first year. And while there was a slight increase in the other-race presence on each of the two campuses, very little of this really could be attributed to the program transfer as such.

So, the situation in Savannah remains one in which they are still working at it. There is hope on both campuses that it will work satisfactorily. There is considerable concern about various ways in which

> it is working out. I should say now, as I mentioned earlier, that faculty were transferred with those. There were 14 faculty from Armstrong State, I believe, that was transferred to Savannah State. Two of those, one retiring, another resigning, and I believe there were nine faculty members that were transferred in other direction. So that those faculty members were transferred with full faculty rank, status, tenure, all rights intact, because the Board of Regents is administratively responsible for both institutions.

(Fincher deposition, pp. 60-64; Facts, Paras. 59-63).

The historically different missions of the proximate Savannah institutions contributed to the difficulties, according to Dr. Fincher.

> . . . In Georgia, you have what I would call considerable tension, which is due to that fact, because you have to remember that Savannah State is a residential college, has dormitories, recruits from a much larger area, supposedly, than Armstrong State does. Armstrong State is primarily a commuter, is a commuter college, has no dormitories, and teaches a lot of their course work in the evenings. So that you have different teaching styles and, I would say, different philosophies of education on the part of the two faculties of the two institutions. There is a strong commitment to students on the part of the Savannah State faculty. They accept responsibility for the total student, so to speak. There is a strong effort to advise and counsel students, to give assistance. At Armstrong State you had a philosophy which is more or less traditional to that of the liberal arts in which you simply lay it out. If students don't get it, something is wrong with the students. There are many, many faculties in the country like that. So that you have this kind of friction.

> Students at Savannah State don't like the way in which some of the faculty that have transferred from Armstrong State teach. They don't feel that these faculty members are interested in them as students. And, consequently, it was the students themselves that lauched [sic] a suit trying to force the merger of the two institutions. And you have different expectations on the part of the faculty in another way. The faculty at Armstrong State was hired with the understanding, implicit or otherwise, that they were free to use their time for outside activities. And they were—they are much more active on the outside than the faculty at Savannah State is. In fact, some faculty members had been able to work out a schedule where they did most of the teaching in the evenings and spent most of the time during the day doing other things.

(Fincher deposition, pp. 72-74; Facts, Paras. 64-65).

Dr. Fincher testified further concerning how the individual choice of students defeated the devised plan:

> . . . In Savannah State, for example, athletes who have come there on scholarships with the expectation they can major in physical education or some area of education no longer can do so, because education has been removed to Armstrong State. Now, this will produce and is producing a push within Savannah State for other majors that will serve their purposes. And the one that is apparently doing this now is recreation and/or parks administration. It's related to that. So that you have the development of what I would call the surrogate major. In other words, students who can't transfer or don't want to transfer will major in something which will take the place of what they had originally intended to major in.

(Fincher deposition, pp. 76-77; Facts, Para. 66).

Dr. Fincher also discovered that the programmatic transfer caused unforeseen administrative nightmares.

Q. Would you evaluate whether or not the programs that were moved from institutions still maintained the degree of quality that they possessed at the transferred institution?

A. I think both Savannah State and Armstrong State are finding that it is very, very difficult to transfer programs, because they are finding out that what they thought to be the program included more than what was transferred. And there has been some very sticky questions raised by: What do you mean by the program? Is it the major field that the student has chosen? And is that major field only those courses which are designated as a major course, those that have 300 and 400 course numbers and have lables [sic] that seem to fit in? There are the other courses that have to be taken. And then there are so many majors that simply just make use of both. You have the problem of: How about business education? In other words, business went to one institution and education went to the other. And if you are going to major in business education, surely you are going to have to have courses in both.

They tried to work it out by having students move back and forth between the two campuses, but they have a problem in working it out. Students will work out some of their own solutions, because at Savannah —no, at Armstrong State computer science has become much more popular since business went to Savannah State.

Q. Let's clear up the question. Has the quality of the program changed?

A. The quality of both programs has been somewhat shaken because of the transfer. There is a lot of rearranging that has to be done. I would see the quality of the program as being directly threatened

> when library holdings, equipment, materials and supplies were not transferred along with the program. It will take some years at least for Savannah State to get the library holdings that will be necessary for the programs in business that they now have. They are going to have to buy office equipment, and instructional materials and things of this sort that would be related to business, because those things were not transferred between institutions. So, whether this was a blind spot on the part of the people making the decision or not—well, yes, I would infer that is probably what it was, because they were familiar enough with program details to recognize that those things would have to go, too.

(Fincher deposition, pp. 79-81; Facts Para. 67).

Plainly, neither merger nor programmatic transfer is a panacea.

C. Merger Would Be The Death Of The Predominantly Black Institutions

Louisiana's predominantly black institutions obviously would not survive a merger whose very purpose was to destroy the racial identifiability of proximate universities. The academic, cultural, and sociological heritages of those institutions, which in the case of Grambling and Southern-Baton Rouge have a long and rich history, would be destroyed. Across the nation, there has been debate over the continued need for predominantly black institutions, touching upon academic, economic, political, social, and cultural issues. In Louisiana and elsewhere, the debate has, at least for the moment, been resolved in favor of their continued existence, in both the public and private sectors, for a complex of reasons.

Some of these were expressed by Dr. Roger Heyns, former Dean of the College of Arts & Sciences at the University of Michigan and then Chancellor of the Uni-

versity of California at Berkeley, in his 1981 deposition in this action:

> . . . We see the need, for a considerable period of time still, strong education programs in those institutions [PBIs]. And the reason for that, in spite of the increase in black presence on white campuses [is] that there's a very significant—something like 60, 75%—of the baccalaureat degrees [given by American Universities to blacks] come from these . . . [T]hese are important sources of leadership in the black community and in society as a whole. We believe there is a special incentive [in black institutions] to [serve] the needs of those students, period. We're impressed with a commitment that many of them make to remedial education, the fact that they do it without a lot of guilt or feeling they're demeaning to them. So the remedial side, the willingness to take larger risks is, I think, a very positive factor for thinking that these institutions have, for the foreseeable future, a very important role.

(Heyns Deposition, Vol. II, pp. 115-117; Facts, Para. 52). To these considerations Dr. Heyns added the importance of providing for black students accomplished black role models. *Id.* at 117. The case for preservation of the PBIs in public higher education was ably stated in *Adams v. Richardson*, 480 F.2d 1159, 1165 (D.C. Cir. 1973):

> A predicate for minority access to quality, postgraduate programs is a viable, coordinated statewide higher education policy that takes into account the special problems of minority students and of Black colleges. . . . [T]hese Black institutions currently fulfill a crucial need and will continue to play an important rule in Black higher education.

Outside of the special environment created by predominantly black institutions, it is questionable whether

all of their black students would succeed in public higher education. Equally questionable is whether many would take the risk of failure in a merged institution, which could not maintain the identity of a counterpart PBI.

Merger, then, poses risks not only for the PBIs, but also for the students they serve.

V. THE JUSTICE DEPARTMENT APPEARS TO FOLLOW NEITHER *GREEN* NOR *ASTA*, BUT A COURSE OF ITS OWN MAKING THAT LACKS LEGAL SUPPORT

The one point on which all parties to this litigation, including Justice, seem to be in agreement is that merger is not an educationally sound or desirable remedy. On the choice of alternative remedies, however, the parties diverge. The Board of Regents advocates a continuing implementation of nondiscriminatory policies and practices combined with affirmative actions, which, having already been pursued by the state, should relieve it of liability. The Justice Department has advocated a program whose principal component is enhancement of the predominantly black institutions. Enhancement is to be achieved through implementation of new academic programs on the PBI campuses, a high level of supplemental state support for those and any other programs that may require strengthening, and substantial improvements to their physical plants through new construction, renovations, repairs, and equipment purchases. Not surprisingly, Louisiana's predominantly black institutions support the position of the Justice Department with great enthusiasm.

Justice's theory is that goldplated predominantly black institutions will attract more white students. First, Justice posits that disparate treatment of PBIs and PWIs has created unequal institutions. The Board of Regents strenuously disputes this claim in Section VII, *infra*. Building on its erroneous claim, Justice then asserts that

the state has the obligation, as part of its affirmative action program, to eliminate the alleged disparities so that the predominantly black institutions can effectively compete for white students. Even apart from the error in the underlying premise of unequal treatment, Justice's theory is fraught with flaws, not the least of which is that it has been proven not to work in practice.

First, the theory substitutes the PBIs themselves, as opposed to the individuals they serve, as the persons entitled to equal protection. However, the PBIs, as creatures of the state, are incapable of experiencing injury under the equal protection or due process clause, and have no right to raise a Fourteenth Amendment claim. *See United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986); *Ayers v. Allain*, 674 F.Supp. 1523, 1560; *Trenton v. New Jersey*, 262 U.S. 182, 187, 191, 43 S.Ct. 534, 537, 538 (1963); *Drayden v. Needville Independent School District*, 642 F.2d 129 (5th Cir. 1981); *Appling County v. Municipal Electric Authority*, 621 F.2d 1301 (5th Cir. 1980). As the Eleventh Circuit commented with respect to the same argument by Justice and the predominantly black institutions in the Alabama higher education case:

> Nothing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a "person" with rights under this statute.

United States v. Alabama, 791 F.2d at 1456.

Second, the theory advanced by Justice has the disturbing ring of a call for "separate but equal" institutions. On hearing the same argument, the Mississippi court properly remarked on its "*Plessy v. Ferguson* doctrinal overtones," before rejecting the argument. *Ayers v. Allain*, 674 F.Supp. at 1561. That the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138 (1896), has been completely repudiated is beyond dispute. *Brown v. Board of Education (Brown I)*, 347 U.S. 483, 74 S.Ct. 686 (1954).

Third, the peculiar focus on enhancement of predominantly black institutions overlooks entirely the state's obligation to promote integration at the predominantly white institutions. The overall objective of Title VI is to insure that all of the state's citizens are accorded equal treatment, and in particular, that all students are afforded equal educational opportunity. There has been no suggestion that *white* students are being denied equal educational opportunity, and thus the Justice Department's stated concern for the PBIs' ability to attract whites seems strangely out of place. There is nothing in Title VI to suggest that black and white students alike cannot be educated in the state's predominantly white institutions. As noted in the preceding section, the state has chosen, for sound policy reasons, to maintain its predominantly black institutions but this does not mean that the state has somehow disserved its white students by doing so. What Justice really seems to be advocating, without saying so, is that the PBIs must be enhanced so that *black* students will have equal educational opportunities *within the PBIs*. This forces reiteration of the principle that *Plessy v. Ferguson* is no more.

The thrust of the state's efforts under Title VI and the Fourteenth Amendment *should be* to insure educational opportunities for black students at the *PWIs*. In 1987 *more than 47% of the blacks enrolled in Louisiana's public institutions of higher education were enrolled at PWIs*. (Facts, Para. 41). This brings us to the fourth flaw in Justice's enhancement theory. The state of Louisiana is experiencing a profound fiscal crisis. (Affidavit of Brian Kendrick, Commissioner of Administration of the State of Louisiana; Facts, Paras. 35-40). The state's general fund, from which all of public higher education is funded, is extremely limited. The enhancement program proposed by Justice can only be carried out at a cost that will diminish the available fund for predominantly white institutions. Reduction of their appropriations would diminish the quality of education received by

the 47% of black students enrolled at the PWIs just as surely as Justice's proposal is designed to enhance the educational experience of the black students enrolled at PBIs.[3]

The fifth, final, and most serious flaw in Justice's theory is that it does not work. Worse, it is counterproductive to the objectives of Title VI and the Fourteenth Amendment. In 1981, before the Consent Decree was put into place, 54 to 57% of the black students enrolled at institutions of public higher education were enrolled at PWIs. (Facts, Para. 23). In 1987, after six years of enhancement of the PBIs under the Consent Decree, black enrollment in higher education was up, but the PWIs' share of those students had dropped significantly to 47%. (Facts, Para. 41). Despite the increase in black enrollment statewide, the PWIs had approximately 2000 fewer black students than in 1981; the PBIs had approximately 4000 more. (Facts, Paras 23, 41). At the same time, white enrollmert at the PBIs showed only a negligible gain, increasing from somewhere around .3% in 1981 to around 1.1% in 1987. Thus, Louisiana's predominantly

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[3] The Mississippi court likewise recognized the illogic of Justice's argument:

> [W]hile differences in level of funding obviously exist, these differences are not accountable in terms of race but rather are explained by legitimate educational distinctions among institutions. The court finds influential the question posed by the defendants. If from the total funding allocated by the legislature, funds that had been allocated to a comprehensive university were taken by the Board and transferred to a black noncomprehensive university, thereby decreasing the availability or quality of a program or programs at the comprehensive university, what would be the effect on black students attending the comprehensive university? Approximately 30% of all black college students attending four-year colleges in the state attend one of the comprehensive universities. To follow plaintiffs' argument to its ultimate conclusion would decrease the quality of the programs available to that 30% of the state's black students.

Ayers v. Allain, 674 F. Supp. at 1562.

white institutions, many of which were well-integrated in 1981, have lost ground during the term of the Consent Decree, while the state's predominantly black institutions have realized negligible gains. Statewide, the institutions are less integrated after six years of enhancement under the Consent Decree.

The Justice Department and the PBIs have responded to the argument by making the startling claim that the enhancement program is in its infancy, and that its real effects on integration can only be measured after enhancement of the PBIs is complete. Putting aside the illogic of their claim that a course toward failure can be reversed by going farther (and faster, if they have their way) in the same direction, what Justice and the PBIs have refused to acknowledge is that *there is no better explanation for the segregation trend Louisiana has experienced over the past six years except the correlation to the enhancement program.*

To be sure, the state has not yet completed all the initiatives it set out to implement under the Consent Decree. In the area of capital improvements, only $34.2 million of the nearly $125 million the state committed to capital improvements for the PBIs has been appropriated. (Facts, Para. 31(h)(ii)). However, this does not diminish the fact that *$34.2 million*, a sizeable sum, has been appropriated. Similarly, of the 62 new academic programs approved by the Board of Regents for the PBIs, some were implemented in the latter years of the Consent Decree and one program prescribed by the Consent Decree remains to be approved. (Facts, Para. 31(h)(i)(1)). However, this does not diminish the fact that *62 new academic programs*, a tremendous number of programs of tremendous range and breadth, have been put into place, many several years ago. Finally, there has been heated debate between the Board of Regents and the PBIs about the level of supplemental funding the state should provide the new academic programs. However, this

does not diminish the fact that from 1982-83 through 1987-88 the state appropriated *more than $65 million dollars* for this purpose; and the Board of Regents has recommended *more than $16 million* for 1988-89. (Facts, Paras. 31(h)(i)(2-6)).

If the Justice Department and the PBIs refuse to acknowledge that these extraordinary appropriations have had any effect, there is little reason for the state to spend more, particularly in light of its desperate financial condition. But with or without the concurrence of Justice and the PBIs, it is obvious that such expenditures have produced results and equally obvious what those results have been: the substantial enhancement of the PBIs and the corresponding attraction of black students into the PBIs. Enhancement of the PBIs of course, has been a positive development. The increase in black enrollment statewide is undoubtedly due, in part, to the improvement of the PBIs, and this has probably brought into public higher education black students who would not otherwise have attended college. Additionally, the improved quality of education offered by the PBIs as a result of enhancement is a development of which the state can be proud. It is only in terms of integration that enhancement has not produced positive results.

The correlation between the enhancement of the PBIs and the movement of blacks out of the PWIs into the PBIs is inescapable. After all, the enhancement program *was designed to attract more students.* That it was designed to attract *white* students should not defeat the recognition that it has actually served to attract *black* students. Given the racial identifiability of the PBIs and the preference of students for same-race institutions, it was predictable that the new programs would act as a draw for black students, and experience confirms the theory. Of the 1586 students enrolled in the new academic programs at the PBIs, only 146, or less than 10%, are white.

Moreover, while enhancement is not complete for all Consent Decree iniatives, some have progressed much further than others. For example, new nursing programs were implemented at Southern-Baton Rouge and Grambling in 1985 and 1984, respectively. At Southern, a new nursing building was erected and equipped at a cost of $6,275,000, and supplemental funds of $55,833 were appropriated in 1982-83, $219,307 in 1983-84, $299,027 in 1984-85, $575,659 in 1985-86, $528,514 in 1986-87, and $582,818 in 1987-88. (Beard Affidavit, Exhibits I and K; Facts, Paras. 31(h)(i) and (ii)). Yet of 63 students enrolled in the program in 1987, 6 were white. (Facts, Para. 44). At Grambling, a new nursing building has just been completed and equipped at a cost of $5,175,000. (Beard Affidavit, Exhibit K; Facts, Para. 31(h)(ii)). Even before the building was occupied, however, Grambling had attracted a large number of white students into the program. The dean and much of the faculty were whites hired from Northeast's nursing program. Of 457 students enrolled in 1987, 43 were white. (Facts, Para. 44). In terms of integration, this program is one of the pitifully few success stories. The 43 whites enrolled in that program alone account for nearly one-fourth of Grambling's campus-wide white enrollment. And it is highly significant that integration was accomplished *before* the building was completed, and despite Grambling's protestations that the supplemental funding provided for nursing was inadequate. Enhancement of the PBIs is plainly not the key to integration.

VI. SLOW AND STEADY WINS THE RACE

Louisiana's PWIs were doing well in their efforts to attract qualified black students before the enhancement of the PBIs pulled many black students out of the PWIs. At institutions like Delgado, Northeast and Northwestern, black enrollment stood at 40.1%, 22% and 19.4%, respectively, in fall of 1981. (Beard Affidavit, Attachment B; Facts, Para. 25). Even at LSU-Baton Rouge, where the

percentage of black enrollment was the lowest at 6.3%, the number of black students enrolled was substantial, 1,688 black students, and was in line with the black enrollment percentages of a number of other flagship universities around the country. (Beard Affidavit, Attachment B; Facts, Para. 25). In 1978-79, LSU's black enrollment was 4.5%. (Facts, Para. 27). That same year, the percentage of blacks enrolled in other states flagship institutions were as follows:

Institution	Percentage
University of Maine	0.3
University of New Hampshire	0.3
University of South Dakota	0.4
North Dakota State	0.4
University of North Dakota	0.5
University of Utah	0.5
University of Vermont	0.5
University of Idaho	0.6
Texas A&M	0.7
University of Oregon	1.2
University of Arizona	1.2
West Virginia University	1.2
University of Nebraska	1.2
University of Wyoming	1.3
University of Rhode Island	1.4
University of Nevada	1.6
Clemson (South Carolina)	1.7
New Mexico State	1.7
University of Minnesota	1.7
Virginia Polytechnical Institute	1.8
University of New Mexico	1.8
Auburn (Alabama)	1.9
University of Colorado	2.3
University of Wisconsin	2.3
Pennsylvania State University	2.4
University of Iowa	2.5
Kansas State	2.5
University of Texas at Austin	2.6

Institution	Percentage
University of California, Davis	2.9
University of Kentucky	3.0
Oklahoma State University	3.0
University of Delaware	3.3
University of Kansas	3.3
University of Oklahoma	3.4
University of California, Berkeley	3.5
University of Connecticut	3.5
Purdue (Indiana)	3.5
University of Massachusetts	3.8
University of Illinois, Urbana	3.9
University of California, San Diego	4.4
University of Georgia	4.4
University of Arkansas	4.5
University of California, Los Angeles	5.1
University of Florida	5.2
University of Virginia	5.3
University of Tennessee	5.5
Ohio State	5.7
North Carolina State	5.7
University of Michigan	6.2
University of North Carolina	6.8
SUNY at Buffalo	7.2
Mississippi State	7.6
University of Maryland	7.8
Rutgers (New Jersey)	9.0
University of Pittsburgh	10.3
University of South Carolina	13.0

(Michael Wasylenko, *Black Student Demand for Higher Education at Large State Universities;* Facts, Para. 28).

Furthermore, over the years, the PWIs were showing steady improvements in black enrollment. (Facts, Para. 26). In view of the increased black enrollment in public higher education in Louisiana during the last few years, it is reasonable to conclude that the percentage enrollment in the PWIs would have continued to grow absent the negative influence of the enhancement programs at

the PBIs. This is not to say that *all* of the gains in black enrollment would have been realized at the PWIs. Undoubtedly, the enhancement program has operated to attract into the PBIs students who would not have attended college elsewhere. However, the stepped-up recruitment efforts at the PWIs should have reinforced the trend of increased enrollment in the PWIs, and only the surge in black enrollments at the PBIs can explain their failure to do so.

If the state continues its affirmative action program into the future, gains in other-race enrollment are inevitable. First of all, with the official barriers to other-race enrollment eliminated and the substantial enrollment and employment of blacks at PWIs today (47% of blacks in public higher education even *after* the losses under the Consent Decree), there is not only equal opportunity for blacks in the PWIs but also an established other-race presence that creates a more comfortable environment for black students. As more black students move through the PWIs the difficulties facing the PWIs in attracting blacks are bound to erode.

Blacks enrolling in PWIs today are no longer groundbreakers. And the declining percentages of blacks enrolled in PWIs in recent years does not detract from the fact that with each passing year the body of black students who have experienced the PWIs firsthand is growing. As those students report back to the black community the facts that they were welcomed, accepted, and successful at the PWIs, the choices of other black students to attend PWIs will become easier. There is no affirmative action the PWIs could take that would replicate this process, and no better tool for recruitment. But this is a process that can only occur slowly, and thus the PWIs must be given time to realize the fruits of their past recruitment efforts. When aggressive recruitment strategies are added to the effects of time, gains in black enrollment are virtually assured.

Factors outside of higher education also bear strongly on the efforts to increase other-race enrollment. As noted earlier, student choice is determined in large part by economic, social, and demographic factors over which the institutions of higher education have no control. As we move toward a more integrated society in all spheres, higher education will share the benefits of that movement. Most directly related to the desegregative efforts in higher education are those in elementary and secondary education. The Fifth Circuit has noted that public higher education is under no duty to "compensate for" or "remedy" constitutional infirmities existing at the elementary and secondary school level, implicitly recognizing that it cannot. *United States v. LULAC*, 793 F.2d 636, 649 (5th Cir. 1986). However, integration of the elementary and secondary schools obviously would have a profound effect on other-race enrollment at the higher education level.

Additionally, there are demographic forces at work which suggest that the continued strength, and perhaps the very survival, of PWIs will depend upon increased enrollment of blacks. The most conservative projections from the Census Bureau for the make-up of five- to seven-year-olds for the year 2020 is 52% white nationwide. (Facts, Para. 78). The basis for this projection is the declining birthrate among whites compared to the continued high birth rates among blacks and Hispanics. (Facts, Para. 78; Exhibit 7). Considering the large black population of Louisiana today, it will not be very long before there is a minority majority in this state. (*See*, Facts, Para. 79). The implications for public higher education are apparent, and thus pragmatism must join liberalism in the push for increased black enrollment.

Radical measures are not necessary to bring about racial integration in higher education. The change is already underway, and its continuation is inevitable.

VII. LOUISIANA HAS IMPLEMENTED NONDISCRIMINATORY POLICIES AND PRACTICES, AND HAS GONE FARTHER

A. Louisiana has a Unitary System of Higher Education

Louisiana has a policy of open admissions for students of all races.[4] (Facts, Para. 16). Any graduate of a state-approved Louisiana high school is entitled to enroll at a public institution of higher education, without regard to the student's high school grade point average or scores on standardized tests. (Facts, Para. 16).

Students have a wide variety of colleges and universities to choose from in this state, which are geographically distributed such that the vast majority of the state's population resides within 40 miles of some institution. (Facts, Para. 6). There are twenty institutions of public higher education, with diverse missions. (Facts, Paras. 1, 31(i)(iii)). The term "mission" refers to the general purpose and scope of an institution. Definition of institutional mission is described in relation to the breadth and depth of the institution's academic offerings, research capabilities, and public service contributions. (Facts, Para. 31(i)(ii)).

Except for Wyoming which has only one public university, all states have public systems of higher education with multiple institutions of differing missions. No state, and certainly not Louisiana, can afford to support all of

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[4] Beginning in academic year 1988-89, LSU will establish admissions standards for the Baton Rouge campus as follows:

> New freshmen will be required to have graduated from an approved high school and to have completed 17½ high school units in seven categories: English composition and literature (4); college preparatory mathematics (3); natural science (3); social studies (2); foreign languages (2); computer studies (½); academic electives (2).

its institutions as major doctoral granting universities. Additionally, to do so would be educationally unsound and fail to meet the needs of the citizens of the state for diverse educational opportunities and experiences. The missions of Louisiana's universities appropriately recognize different purposes, programs, and emphases for each institution. (Facts, Para. 31(i)(iii)).

Classifications of institutions are generally based upon the number and level of degree programs offered by an institution and the number of fields in which degrees are granted. (Facts, Para. 31(i)(iv)). The Southern Regional Education Board (SREB) employs a classification system based on this scheme, which includes eight categories of institutions. The SREB model is a comprehensive and appropriate classification with which to illustrate the distinctions among Louisiana's institutions of higher learning. The SREB classification is as follows:

CATEGORY	DEFINITIONS
Doctoral I	Institutions awarding at least 100 doctoral degrees which are distributed among at least 10 HEGIS categories (two-digit classification) with no more than 50 percent of the degrees in an one category.
Doctoral II	Institutions awarding fewer than 100 but at least 30 doctoral degrees which are distributed among at least five HEGIS categories (two-digit classification).
Doctoral III	Institutions awarding fewer than 30 but at least one doctoral degree.
Masters I	Institutions offering master's level programs in ten HEGIS categories (two-digit classification) and awarding at least 100 masters degrees.
Masters II	Institutions awarding fewer than 100 but at least one masters degree.

CATEGORY	DEFINITIONS
Baccalaureate	Institutions that award the baccalaureate degree as the highest degree.
Two-year	Junior Colleges—Institutions that offer the first two years of coursework toward a baccalaureate degree which can be transferred to four-year institutions.
	Comprehensive Community Colleges—Institutions that offer coursework toward a baccalaureate degree transferable to four-year institutions and coursework leading to an associate degree in occupational or technical programs.
	Postsecondary Vocational Schools—Institutions that offer coursework leading primarily to the awarding of certificates or diplomas and which are involved in long-term adult education programs.
Specialized	Stand-alone institutions with specialized degree programs such as medical or health science centers, law centers, law schools, fine arts schools, engineering schools, etc.

(Facts, Para. 31(a)(v)).

Louisiana's public institutions of higher education are classified as follows according to the SREB system:

Category/Institution	Fields Offered at Appropriate Degree Level [5]
Doctoral I	
LSU	13
Doctoral II	
-0-	-0-

[5] Numbers reflect the number of broad HEGIS classifications in which programs are offered rather than number of degree programs offered.

Category/Institution	Fields Offered at Appropriate Degree Level [5]
Doctoral III	
Grambling	1
Louisiana Tech	2
Northeast	1
SU at Baton Rouge	1
Southwestern	4
UNO	4
Masters I	
Northwestern	1
Masters II	
McNeese	9
Nicholls	3
Southeastern	6
LSU at Shreveport	2
SU at New Orleans	1
Baccalaureate	
-0-	-0-
Two-Year	
Delgado	7
LSU at Alexandria	6
LSU at Eunice	6
SU at Shreveport/Bossier City	6
Specialized	
LSU Law Center	1
LSU Medical Center	1

(Attachment M to Beard Affidavit; Facts, Para. 31(i)(v)).

A review of the distribution of Louisiana's institutions of public higher education among the SREB categories reveals that, with the exception of Doctoral I, a position occupied by only the state's flagship institution, the predominantly black institutions are intermixed with predominantly white institutions in every category. *Id.* The

classifications have not been determined by racial considerations and the state has not assigned its PBIs a lesser role in higher education.

The institutions come under the management of three boards. The Board of Supervisors of Southern University and Agricultural and Mechanical College governs: Southern University-Baton Rouge, Southern University-New Orleans, and Southern University-Shreveport/Bossier City. (Facts, Para. 2). The Board of Trustees for State Colleges and Universities governs: Delgado Community College, Grambling State University, Louisiana Tech University, McNeese State University, Nicholls State University, Northeast Louisiana University, Northwestern State University, Southeastern Louisiana State, and the University of Southwestern Louisiana. (Facts, Para. 3). The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College governs: Louisiana State University-Baton Rouge, Louisiana State University-Alexandria, Louisiana State University-Eunice, Louisiana State University-Shreveport, the University of New Orleans, the Louisiana State University Medical Center, the Louisiana State University Agricultural Center, and the Paul M. Hebert Law Center. (Facts, Para. 4). The Board of Regents has planning, coordinating, and budgetary responsibility for all of public higher education. (Facts, Para. 9). Blacks and whites are well-represented on all boards as follows:

1988 Composition of Higher Education Boards

	% White	% Black
a) Board of Regents	80	20
b) Southern	24	76[6]
c) Trustees	71	29
d) LSU	76	24

(Facts, Para. 12).

[6] This figure includes a black member of the Board who resigned in April, 1988 and has not yet been replaced.

On the Board of Regents, which is the only Board for which such data was collected for filing with this motion, blacks hold office and serve on all standing committees. (Facts, Para. 13, 14).

State funding for higher education is equitably distributed according to the *Formula*, an objective mechanism that is driven primarily by the institutions' production of student credit hours (SCH's). Different values are assigned to SCH's according to the level of the student and the costs associated with the operation of the disciplines involved. Funding for operation and maintenance is provided according to a range of values based on utilization of the institutions' buildings. Funding for utilities is based on the institutions' consumption rate, history, and a projected utility rate for the forthcoming year. A "hold-harmless" provision protects against funding below the preceding year's appropriation. (Facts, Para. 17, 19).

The objective of the *Formula* is to achieve the average appropriation per full-time equivalent (FTE) student of other SREB states. (Facts, Para. 20). Because Louisiana's public institutions of higher education have differing missions, the purpose of the *Formula* is not to distribute funds equally but to distribute them equitably. (Facts, Para. 18). The predominant racial characteristic of an institution plays no part in the *Formula* operation. Indeed, under the *Formula*'s mathematical calculations, it would be impossible to single any institution out for disparate treatment.

In actual operation, the *Formula* has favored black institutions. The *Formula* contains a "hold-harmless" provision that no institution need request less than the current year's appropriation for *Formula* purposes. This hold-harmless provision results in differing levels of *Formula* implementation among the institutions. If enrollment and subsequent student credit hour production decline, an institution is not penalized by a reduction in *Formula* dollars. The following are examples of the hold-

harmless provision at work to the overall benefit of the PBIs: in 1981-82, the statewide average rate of implementation was 97.7%. In that same year Grambling's implementation rate was 118.7%, SUBR's rate was 106.5%, SUNO's rate was 100.0%, and SUSBO's rate was 95.3%. (Facts, Para. 19). Among PWIs, LSU was implemented at 96.5%, and USL was implemented at 95.3%. PBIs have also been favored in recent years. In 1986-87 the *Formula* generated substantially more dollars per FTE student for Southern University-Shreveport/Bossier than any other state institution. Southern-Baton Rouge, Grambling and Southern-New Orleans ranked fourth, fifth and sixth, respectively, out of 17 institutions of public higher education in the amount of state funding received per FTE student. (See Attachment P to Beard Affidavit; Facts, Para. 22).

Nothing in the design, structure, operation, or governance of Louisiana's public institutions of higher education discriminates on the basis of race. If there is a "system" of public higher education in Louisiana, it is a unitary one.

B. Louisiana's Affirmative Action Program Exceeds the Requirements of the Constitution

Since the entry of the Consent Decree on September 8, 1981, Louisiana has been intensively engaged in the implementation of the affirmative action program embodied in that decree. Affirmative action predated the Consent Decree, but because the Board of Regents did not closely monitor the institutions' efforts in that regard, it cannot recount them in this memorandum. The Regents do, however, have knowledge of the efforts undertaken over the past six years, which go much further than the discontinuation of discriminatory practices and adoption of a wholly neutral admissions policy required by *ASTA* and *Bazemore*.

1. *Governance.* During the term of the Consent Decree, the state undertook to increase the number of other-race members on each higher education board; a number of new gubernatorial appointments to each board provided the opportunity for change. The racial composition of the Board of Regents remains 80% white and 20% black, as it was in 1981. The black members play an active role in the Regents' actions, holding office and participating in each standing committee. On each of the management boards, there has been change in the racial composition, in some cases substantial. From 1981 to 1988, white membership on Southern's Board grew from 12% to 24%; on the Board of Trustees, black membership rose from 12% to 29%; and on the LSU Board black membership grew from 6% to 24%. Each board now has substantial other-race membership. (Facts, Para. 12).

2. *Student Recruitment*

a. *Informational Activities.* From 1982-83 through 1987-88, the Board of Regents annually prepared and disseminated informational brochures and pamphlets designed to inform all citizens of educational opportunities available at state institutions and to encourage all citizens to attend other-race state institutions. One such brochure listed all undergraduate institutions and the undergraduate programs offered by each such institution. The Board of Regents also prepared and disseminated a similar brochure listing all institutions that offer graduate and professional programs and describing the programs offered at each such institution. Both brochures provided the address of each institution and information on how to obtain application forms. Both brochures informed the students of available financial assistance and contained a clearly stated nondiscrimination policy. Copies of the undergraduate brochure were sent to all public and private high schools, community colleges and vocational and technical institutions in

Louisiana; copies of the graduate brochure were sent to each public and private four-year institution of higher education in the state. Copies of both brochures were also sent to the personnel directors of major private and governmental employees within the state and were made available to the public. Altogether, no less than 8,000 undergraduate brochures and 4,000 graduate brochures were distributed annually. (Facts, Para. 31(a)(i)).

The Board of Regents has also prepared, for broadcast on radio stations that have large black audiences, public service announcements designed to encourage other-race students to apply for admission to the various public institutions. Each of the state's institutions reported similar use of recruitment literature and public service announcements geared to an other-race audience. (Facts, Para. 31(a)(ii)).

b. *Recruitment Plans.* The Consent Decree required that each institution, both predominantly white and predominantly black, develop and submit to the Board of Regents a student recruitment plan designed to attract other-race students. The minimum components for an acceptable plan included commitments to:

(1) employ a person primarily responsible for other-race recruitment;

(2) utilize the appropriate list of students provided by the Board of Regents as required by the Consent Decree;

(3) design and distribute recruitment literature emphasizing other-race students;

(4) provide a list of the high schools to be visited for recruitment purposes;

(5) maintain files of recruitment activities;

(6) prepare and implement advertisements and public service announcements geared to the recruitment of other-race students; and

(7) describe the specific strategies to be implemented to recruit other-race students.

The other-race recruitment plans were submitted to the Board of Regents and approved in December, 1981. The management boards annually reported compliance with these plans. (Facts, Para. 31(b)(i), 33).

c. *Additional Support for Other-Race Recruitment at PBIs.* Each year, the Board of Regents recommended to the Governor and the legislature that additional monies be appropriated to the predominantly black institutions for other-race recruitment as follows: Southern University-Baton Rouge—$143,294; Southern University-New Orleans—$50,095; Southern University-Shreveport—$26,000; Grambling State University—$99,000. The legislature annually appropriated the necesary funds for other-race recruitment activities of the predominantly black institutions from 1982 through 1987. (Facts, Para. 31(b)(ii)).

d. *Other-Race Recruiters.* Each institution employed an individual whose primary responsibility was other-race recruitment. (Facts, Para. 32(a)).

e. *Use of Lists.* To assist the institutions in identifying prospective undergraduate other-race students, the Board of Regents obtained from the American College Testing Program and provided to each institution following each administration of the ACT assessment, a list of all Louisiana students (by race) still enrolled in high school who took the American College Test (ACT) and agreed to have their names released. (Facts, Para. 32(b)(iii)).

The Board of Regents also developed and provided to the predominantly white institutions which have graduate and professional programs a list of all black students expected to graduate each year from public and private undergraduate institutions in Louisiana who agreed to have their names released. Each predominantly

white institution is required to seek applications from qualified students whose names appear on the list. Furthermore, at the Regents' request, the Law School Admission Service made arrangements with Paul M. Hebert Law Center and Southern University Law Center to provide annually lists of students identified by race who were law school applicants and indicated that Louisiana was their state of residence or listed a mailing address in Louisiana. Names of other-race students taking the Medical College Admission Test (MCAT) were annually provided to the Louisiana State University Medical Center through the Office of Minority Affairs at the Association of American Medical Colleges. Information about students taking the Dental Admissions Test was obtained from the American Dental Association. The institutions reported use of these lists for direct mailings to qualified other-race applicants. (Fact, Para. 31(b)(iv); 32(f)).

f. *Access to High School Students.* The Board of Regents and the Board of Elementary and Secondary Education jointly developed and adopted a policy designed to ensure that no Louisiana public institution of higher education would be denied equal access to public high schools to conduct student recruitment activities. Each of the three management boards adopted a policy that prohibited institutions under its control from recruiting at any public or private high school, community college, or other educational institution that did not allow equal access to all public institutions of higher education for purposes of recruitment. (Facts, Para. 32(c)).

In 1987, following some isolated complaints by predominantly black institutions about recruiting difficulties, the Board of Regents undertook to oversee enforcement of the equal access policy in concert with the Board of Elementary and Secondary Education. By letter dated October 9, 1987, the Board of Regents, through counsel, inquired of each predominantly black institution whether any reported cases of recruiting violations had not been

resolved to their satisfaction. The institutions were also invited to notify the Board of Regents of any further recruiting problems. None were reported. (Facts, Para. 31(c)(ii)).

g. *Other Race Recruiters' Conference.* To assist the institutions in their student recruitment efforts, the CDMC annually sponsored an other-race recruiters' conference in 1984, 1985, and 1986, which were attended by representatives of all institutions. At these conferences, the institutions exchanged ideas on effective recruitment strategies. The conference was discontinued in 1987 because of the unavailability of state funds for travel. (Facts, Para. 34).

3. *Student Financial Assistance.* After the signing of the Consent Decree, the Governor's Special Commission on Education Services adopted a policy to ensure that state funds administered by it and available to undergraduate and graduate students would be administered in a manner to assist each institution to achieve its other-race enrollment goals. (Facts, Para. 31(d)(i)).

The State of Louisiana established a scholarship program to assist those institutions offering professional programs in medicine, dentistry, veterinary medicine, and law to increase the level of other-race participation. One hundred fifty (150) scholarships, in the amount of $5,000 each, have been awarded between 1982 and 1988. On April 28, 1988, the Board of Regents voted to amend its budget recommendations for the 1988-89 fiscal year to include $110,000 to continue the scholarship program for black students in medicine, dentistry, and veterinary medicine. (Facts, Para. 31(d)(ii)).

4. *Developmental Education.* The Board of Regents adopted a model developmental education program, embodying the following components:

- counseling for development education students

- developmental education committee to establish institutional policies on developmental education
- special orientation for developmental education students
- tutorial assistance to supplement classroom instruction
- faculty/staff training in developmental education
- developmental classes in English, reading, and math
- a goal of 25:1 student/faculty ratio in developmental education classes
- annual evaluation with corrective action when appropriate

(Facts, Para. 31(e)(i)).

Each institution developed a program based on the model. Developmental education programs were funded at a high level under the *Formula.* The Board of Regents recommended and the legislature appropriated for the years 1982-83 through 1987-88 substantial monies for developmental education programs at the predominantly black institutions over and above *Formula* appropriations. For the six-year period, these outside-the-*Formula* appropriated funds totalled $8,044,818. (Facts, Para. 31(e)(ii)).

The Board of Regents has evaluated the developmental education programs on an annual basis since 1983. In its June, 1987 evaluation the Board of Regents concluded that the institutions had implemented the developmental education programs as required by the Consent Decree. (Facts, Para. 31(e)(iii)).

5. *Other-Race Employment.* The staff of the Board of Regents is composed of 32 individuals, 25% of whom are black. Moreover, 25% of the new staff hired by the

Regents over the past six years has been black. (Facts, Para. 31(f)).

Under the Consent Decree the Board of Regents established a graduate fellowship program designed to increase the pool of other-race faculty qualified to teach at state institutions. Each September from 1982 through 1987 the Board requested that each institution identify three fields in which other-race faculty recruitment efforts had been unsuccessful because of the lack of qualified applicants. In November, the Board of Regents requested that each four-year predominantly white institution nominate three black persons, and the Southern University System and Grambling State University each nominate one white person lacking the terminal degree to compete for one of ten $10,000 fellowships to support full-time graduate study. Upon completion of the terminal degree, the recipient was asked to teach for at least three years at a Louisiana public institution where he/she would be an other-race faculty member. (Facts, Para. 31(g)(i)).

As of June 30, 1987, 14 of the 51 graduate fellowship recipients had completed the requirements for the terminal degree. Seven of the 14 graduates were employed at an other-race institution. One graduate fellowship recipient had completed her obligation, and two recent graduates were seeking employment. From 1982 through 1987, the legislature appropriated $1,554,313 in support of the Board of Regents' graduate fellowship program. The Regents have recommended additional funding of $210,000 in 1988-89 for graduate fellowships. (Facts, Para. 31(g)(ii)).

The institutions have contacted the Clearinghouse for assistance in identifying potential black applicants and have also reported implementation of other affirmative steps to identify and solicit employment applications from qualified other-race persons. (Facts, Para. 32(h)).

6. *Enhancement of the Predominantly Black Institutions.* The most costly and ambitious Consent Decree initiatives related to the enhancement of the state's predominantly black institutions. Enhancement moved forward simultaneously on several fronts: in the implementation of new academic programs; in the improvement of facilities; and in increased financial support generally and for a number of discrete purposes.

a. *Enhancement of Academic Programs.* Under the Consert Decree a total of 62 new academic programs were approved by the Board of Regents for implementation at the predominantly black institutions. By June 7, 1988, 19 new programs had been put into place at Southern University-Baton Rouge, 14 new programs at Southern University-New Orleans, 18 new programs at Grambling State University, and 11 at Southern University-Shreveport. In addition, five cooperative programs had been approved for implementation by Southern University-Shreveport and Bossier Parish Community College. Two programs prescribed by the Consent Decree have not been implemented by the Board of Regents. Grambling State University withdrew its request for the M.S. in Science Education and Southern University-Baton Rouge requested a Ph.D. in Accounting instead of the prescribed Doctor of Professional Accountancy. The latter request was approved by the Justice Department in 1987. Southern has indicated, however, that its program proposal will not be submitted to the Regents in the near future. The list of the new academic programs, by institution, appears in Attachment H to the Beard affidavit. (Facts, Para. 31(h) (i) (l)).

To supplement funding provided under the *Formula*[7] and by student fees collected from the new students enrolled in the new academic programs, the Board of Regents has each year since 1982 recommended outside-

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[7] See discussion at pp. 47-48, *supra.*

the-*Formula* funding for the support of these programs. Ordinarily, when an institution implements a new academic program, it is required to support that program entirely from *Formula* and self-generated funds. However, the Regents recognized that the PBIs could not quickly and successfully implement the number of new programs prescribed by the Consent Decree without added support. It therefore recommended supplemental funding. In 1982-83, the legislature appropriated $685,210 in outside-the-*Formula* funds to predominantly black institutions for new academic program support; it appropriated $3,457,343 in 1983-84; $6,641,742 in 1984-85; $11,581,220 in 1985-86; $12,793,859 in 1986-87; and $13,011,782 in 1987-88. Also included is an amount of $284,986 to Grambling for help in operation of their physical plant; $2,964,112 for the Off-Campus Center at Southern University-Shreveport/Bossier City; an amount of $3,745,409 has been appropriated to Southern University-Baton Rouge for operation of the Center for Small Farm Research; an amount of $231,444 was appropriated to Southern University-Shreveport/Bossier City for their Management Information System; and $516,449 was funded for administrative positions at Southern University-Shreveport/Bossier City. Although the Consent Decree terminated on December 31, 1987, the Board of Regents has recommended continued funding $15,186,520 for these new academic and other program support in 1988-89. A list of the special appropriations for predominantly black institutions from 1982-83 through 1987-88, as well as actual expenditures, appears as Attachment I to the Beard affidavit. The Board's recommended funding for 1988-89 appears as Attachment J to the Beard affidavit. (Facts, Para. 31(h)(i)).

Included in the new academic programs at the predominantly black institutions are joint allied health programs with the LSU Medical Center. These were established in the fields of medical technology, physical ther-

apy, cytotechnology occupational therapy, rehabilitation counseling, and cardiopulmonary science. For the past six years the state has provided an allied health counselor and support staff on each predominantly black campus. These individuals hold joint appointments with the LSU Medical Center and the predominanly black institution and are reimbursed by the LSU Medical Center. They serve full-time at the predominantly black institutions, and the counselor may teach one or more courses in the basic sciences. For the years 1982 through 1987 the legislature appropriated a total of $4,612,516 to support the joint allied health programs at the LSU Medical Center and predominantly black institutions. Despite the termination of the Consent Decree on December 31, 1987, the Board of Regents has recommended additional funding of $474,182 for the Medical Center support of allied health programs in 1988-89. (Facts, Para. 31(h)(i)(6)).

In recommending outside-the-*Formula* funding for new academic programs, the Regents attempted to develop programmatic budgets comparable to those of other public higher education institutions in the state. The Regents' recommendations were often lower, and sometimes substantially lower, than the predominantly black institutions' requests. The most common disagreements between the Regents and the PBIs related to the number of administrators, faculty, and staff required for a new program, and the salaries of employees. (Facts, Para. 31(h)(i)(3)). A few representative comparisons will serve to demonstrate how far the PBIs budget requests strayed from the budgets at other institutions, and how generous the state's support of the new academic programs has been. Like Grambling, LSU-BR has a master's level program in Criminal Justice; it also has a baccalaureate program. In fall, 1987, the combined total of students majoring in *both* programs was *216* (12 graduate; 204 undergraduate). Its *combined* 1986-87 expenditures *for the graduate and undergraduate* programs were *$291,445.*

By comparison, Grambling had *49* majors enrolled in its graduate program in fall, 1987. *For the graduate program alone,* Grambling's 1986-87 budget request was *$677,701.* The state appropriated $327,076, and even after the budget cuts, Grambling received *$298,952,* more than LSU spent for more than four times the number of students at two-levels of instruction. Like Grambling, LSU-BR also has a master's program in social work, in which *248* majors were enrolled in fall, 1987. Its program expenditures for that year totalled *$786,755.* In 1987, Grambling had *45* majors enrolled in its M.S.W. program. Its budget request for 1986-87 was *$1,439,275.* After the budget cut it actually received *$633,323* for instruction of less than one-fifth the students enrolled at LSU-BR. Both Grambling and Southern-BR implemented new nursing programs for which new buildings were erected. Southeastern also has a School of Nursing. In fall, 1987, *677* majors were enrolled in Southeastern's program and its budget was *$903,751.* In that year, SU-BR had *63* majors enrolled and requested *$909,723,* more than Southeastern's budget for one-tenth the students; SU-BR received *$464,795* after the budget cuts. Grambling, which had *457* majors, requested *$728,308* in 1986-87 and received $579,564 after the cuts. Northwestern has three baccalaureate programs in Industrial Technology, similar to SUNO's B.S. in Technology. In fall, 1987, *99* majors were enrolled in Northwestern's three programs. Its program expenditures for 1986-87 were *$117,953.* SUNO, which had *6* majors enrolled in its program in fall 1987, requested *$577,052* and received *$299,012.* These examples were chosen not because the PBIs' requests for these programs were unusually inflated; to the contrary, they have sought far more money for other programs in other years. These illustrations simply provide some of the easier comparisons to similar programs. (Attachment I to Beard Affidavit; Facts, Para. 31(h) (i) (4); Paras. 74-77).

Most of the parties' disagreement in this action centers around the Regents' refusal to rubber-stamp the PBIs' budget requests for new academic programs. The discrepancies between the institutional requests and the Regents' recommendations are dramatic indeed; but comparison to the PWIs budgets for similar programs shows that the drama is provided by the level of the PBIs' requests, not the level of state funding. This issue of the proper level of state funding plainly cannot be resolved on motion for summary judgment. The point here is that the Board of Regents, the body constitutionally authorized to approve institutional budgets, has operated fairly, reasonably and in a non-discriminatory manner to arrive at indisputably large amounts of supplemental funds for the PBIs' new academic programs. The funds provided for the PBIs were *in addition* to *Formula* funds, any self-generated monies, and student fees collected from the students who enrolled in the new academic programs. *The above-listed expenditures of the PWIs came from the latter sources alone with no state-provided supplementation.*

b. *Capital Improvements at Predominantly Black Institutions.* Under the Consent Decree the State of Louisiana undertook to improve existing facilities and construct new facilities at the predominantly black institutions such that their physical plants would be comparable to those of similar predominantly white institutions. In 1982, a panel of experts studied the nature and extent of deficiencies at the predominantly black institutions and identified capital outlay projects necessary to upgrade the physical plants of predominantly black institutions.[8] In

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[8] The state acknowledged that the PBIs' facilities were deficient by comparison with those of roughly comparable PWI, but denied that the state was responsible for the deficiencies instead, it asserted that mismanagement by the PBIs had caused subsatntial deterioration of their facilities. Nevertheless, the state undertook to make the improvements necessary to achieve comparability.

1983, the Board of Regents adopted a five-year capital outlay plan, which has been revised annually. A total of $34,213,375 has been appropriated and received by the institutions for capital projects at the predominantly black institutions; and the Regents' capital outlay plan calls for the appropriation and expenditure of an additional $89,831,316. A summary of the capital projects at each predominantly black institution appears as Attachment K to the Beard Affidavit. The Board of Regents' 1988-89 five-year capital outlay plan is Attachment L to the Beard Affidavit. (Facts, Para. 31(h)(ii)).

From 1983 through 1988, improvements at the predominantly black institutions have dominated the state's capital outlay for public higher education. In 1982, when Consent Decree planning monies were first appropriated, the PBIs received 9.08% of all the state funds allotted to higher education projects (outside of emergency projects and those funded by self-generated cash). In 1983, that percentage rose to 25.7%; in 1984 it was 69.5%; in 1985 it was 46.4%; in 1986 it was 42.2%; and in 1987 it was 32.6%. (See Attachment R to Beard Affidavit; Facts, Para. 31(h)(iii)). The 1988 capital outlay bill, which has not been passed by the legislature, includes $35,105,000 for state-funded projects in public higher education. Of that amount, $23,605,000, or 67%, is targeted for projects at the PBIs. (See Attachment S to Beard Affidavit; Facts, Para. 31(h)(iv)).

In recent years, the state has allocated a disproportionate share of its scarce resources to enhancement of the predominantly black institutions.

c. *Increased Financial Support.* Prior to the Consent Decree the Board of Regents had recommended parity funding between the Southern Law School and the Paul M. Hebert Law Center. In 1983, the Board of Regents amended the *State Appropriation Formula* to include a parity mechanism. (Facts, Para. 31(h)(v)

(1)). Additionally, from 1982 through 1987 the state provided additional funds in the amount of $285,000 per year to Southern University for enhancement of its law school. (Facts, Para. 31(h)(v)(2)).

From 1982 through 1987 the legislature additionally appropriated $1,000,000 per year for the enhancement of predominantly black institutions; the enhancement funds were distributed as follows: $373,000 annually to Grambling State University and $627,000 annually to the Southern University System. (Facts, Para. 31(h)(v)(3)).

d. *Faculty Development Program.* Each fiscal year from 1982-83 through 1987-88 the Board of Regents recommended $70,000 to Grambling State University and $230,000 to the Southern University System for faculty development. The purpose of this program was to provide advanced educational opportunities for faculty members at Louisiana's predominantly black institutions. Faculty members who lacked the terminal degree were given the opportunity to take paid leaves of absence in order to obtain their terminal degrees. Total appropriations for this program were $1,793,100. (Facts, Para. 31(h)(vi)).

7. *Approval and Elimination of Programs.* Efforts to enhance the predominantly black institutions were not restricted to the work on their campuses. The Board of Regents also curtailed development at the predominantly white institutions that might adversely affect the academic expansion at the PBIs, and in all of the Regents' actions regarding programs, they considered the potential effects on the PBIs' enhancement.

From September 8, 1981 forward, the Board of Regents, prior to approval of any new academic program at a predominantly white institution, assessed the impact of implementing the program on the achievement of other-race enrollment goals at predominantly black

institutions. The Board developed a questionnaire to be completed by each predominantly white institution proposing an academic program and a set of questions to be answered by predominantly black institutions concerning each new academic program which a predominantly white institution proposed. The institutions' responses to these questionnaires were included in impact assessments prepared by the Board for each program proposed by a predominantly white institution and acted upon by the Board of Regents. From 1982 through the present, the Board has considered 130 proposals for new academic programs from predominantly white institutions. Twelve were disapproved, and actions on 6 were deferred on the grounds of quality or need. Of the remainder, the Board disapproved 21 because they posed the risk of impairing other-race enrollment at predominantly black institutions. The Board deferred action on 5 proposed programs for the same reason. Of the 86 program approved at predominantly white institutions since 1982, 6 received approval only after the attachment of stipulations designed to encourage other-race enrollment at predominantly black institutions. Most recently, for example, the Board approved the M.S. in Systems Technology at Louisiana State University-Shreveport with the stipulation that all coursework would be offered at Barksdale Air Force Base and no class would begin before 4:30 p.m. The purpose of these restrictions was to prevent the new program from negatively impacting on the Master of Business Administration (Computer Information Systems option) at Grambling State University. (Facts, Para. 31(j)(i)).

The Board of Regents periodically reviews academic programs at institutions throughout the state to assess educational quality and need. Those programs not meeting the Regents' standard are subject to elimination. In recent years, the state's fiscal crisis has placed added pressure on the Board of Regents to eliminate duplicative programs or programs of inadequate quality and in-

sufficient need. From 1982 through the present the Regents have reviewed 583 programs; 106 of these were located at predominantly black institutions. Of the 503 programs reviewed, 514 were maintained and strengthened, and 69 were terminated; 14 of the programs terminated were located at predominantly black institutions. (Facts, Para. 31(j)(ii)).

Not included in these totals are the "low completer" program reviews which the Board undertook during 1987 due to budgetary constraints. The Board reviewed 459 programs which had produced fewer than 5 graduates during the previous 5 years. 293 of these were maintained and strengthened, while 166 programs were terminated. Among the "low completer" programs terminated, 41 were located at predominantly black institutions. In 36 of the 41 instances of termination, the predominantly black institutions concurred with action by the Regents. (Facts, para. 31(j)(iii)).

In its reviews of existing programs at predominantly black institutions, the Board of Regents has considered whether elimination might disproportionately affect the institution. This consideration has persuaded the Board of Regents to refrain from terminating several programs at predominantly black institutions that might have been terminated if considerations of duplication, need, and quality alone had been determinative. For example, due to serious questions regarding both quality and need, separate teams of consultants recommended the termination of the architecture and engineering programs at Southern University-Baton Rouge. The Board of Regents, recognizing the importance of these programs to the enhancement of Southern University, voted to maintain and strengthen each program. (Facts, Para. 31(j)(iv)).

8. *Cooperative Plans.* Proximate institutions (UNO and SUNO; Grambling and Louisiana Tech; SUSBO and BPCC; and SU-BR and LSU-BR) developed cooperative

plans with several components. There were provisions for student and faculty exchanges, which were carried out, although the student exchange goals were not always met. See Annual Reports. The institutions also worked together to establish three or more dual or other cooperative exchange programs. Facts, Para. 32(j)).

To recount such efforts in summary fashion is to pass over the thousands of hours of thought and work that were devoted to implementing all of these programs. The contributions of administrators, faculty, and staff should not be minimized, however. Suffice it to say that the work could not have been done without serious commitment and effort by the institutions, their management boards, and the Board of Regents.

No one has suggested that the State of Louisiana did not implement all of the foregoing programs. The dissension that has arisen has been levelled at the amount of funding provided for the enhancement effort. Such criticism should be evaluated in light of the state's fiscal condition over the past few years. According to the affidavit of Brian Kendrick, Commissioner of Administration of the State of Louisiana, which is attached to the Regents' Statement of Material Undisputed Facts as Exhibit No. 4, the state's declining revenues in recent years, due primarily to the decline in oil prices and the related slowdown in the oil and gas industry, has resulted in a $446 million deficit in the state's unreserved, undesignated General Fund balance as of June 30, 1987 (projected to be over $800 million as of June, 1988). (Kendrick Report, p. 1; Facts, Paras. 35, 36). Since fiscal year 1981-82, the state General Fund revenues have decreased by an average annual rate of —3.6% in real terms adjusted for inflation. (Kendrick Report, p. 2; Facts, Para. 37). This shortfall of revenues compared to expenditures has required drastic cuts in state expenditures for the current fiscal year and the 1988-89 fiscal year commencing July 1, 1988. Those budget cuts are outlined by Mr. Kendrick at pp. 3-6 of his report. (Facts., Para. 38).

The state's financial woes have restricted enhancement under the Consent Decree in two respects. First, it has delayed progress on the capital outlay projects the state agreed to complete. However, the state has not advanced its financial difficulties as an excuse for abandoning these projects. It simply cannot complete them until the funds are available. Second, the state's inadequate resources influenced the Board of Regents to restrict the supplemental funding recommended for new academic programs. The Regents' objective was to make the new programs comparable to those at other public institutions of higher learning. Because higher education is underfunded in Louisiana comparable funding of the new programs was necessarily lower than they might have received in other states. It was, however, a tremendous contribution by a state in financial distress. Moreover, it should be borne in mind that *anything* given to the PBIs to support their new academic programs was more than *everything* the state has ever provided to the PWIs, who are required to provide their own support for new programs.

Over *$83 million* has been appropriated for Consent Decree initiatives *outside of Capital Outlay* during the past 6-½ years. Attached to Mr. Kendrick's report are copies of five Executive Orders of the former governor (EWE 82-21, 83-28, 86-6, 86-31, and 87-34) which provided for general reductions in state expenditures; Consent Decree appropriations were either entirely exempted from each budget cut or the impact of the cut upon Consent Decree appropriations was reduced in comparison to the general reduction. (Kendrick Report, p. 7; Facts, Para. 39). The Regents have recommended more than *$16 million* for fiscal year 1988-89. Mr. Kendrick stated in his affidavit that the General Appropriations Bill (House Bill 626) provides more than $14.8 million for Consent Decree initiatives, excluding capital outlay. (Kendrick Report, page 7; Facts, Para 40). Despite its

financial difficulties, the state has not stinted on these programs. And the money it has spent is an expression of the commitment it made and the priority it assigned to achievement of the Consent Decree objectives.

Louisiana has gone far beyond neutral admissions and nondiscriminatory policies and practices in public higher education. It has gone far beyond what Title VI or the Constitution requires.

VIII. THE UNITED STATES DOES NOT HAVE THE AUTHORITY TO ASSERT ITS FOURTEENTH AMENDMENT CLAIMS

The Justice Department relies on both the Fourteenth Amendment and Title VI to bring this action. However, the action may only be maintained on the basis of Title VI because Congress has not provided statutory authority for the executive branch's Fourteenth Amendment claim. Under the Fourteenth Amendment, no independent role is given to the executive branch. Section 1 of the Fourteenth Amendment seeks to prevent the states from infringing upon individual rights. Section 5 grants Congress the power to enforce the provisions of the Fourteenth Amendment by "appropriate legislation." Therefore, the Justice Department may not bring suit under the amendment unless Congress has provided specific statutory authority to do so. This conclusion has been accepted by most courts which have considered the question and is a sound conclusion which preserves the nature of the governmental structure established by the Constitution.

Courts have explicitly rejected the Justice Department's contention that the executive has the right to bring suit to redress Fourteenth Amendment rights in the absence of congressional legislation.[9] *United States*

[9] The Fifth Circuit has not specifically decided the issue of the executive branch's right to sue under the Fourteenth Amendment

v. Philadelphia, 644 F.2d 187 (3d Cir. 1980); *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979); *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977). First, the language of the Fourteenth Amendment itself provides the initial basis for the courts' conclusions. Section 5 explicitly grants enforcement powers only to the Congress. *Philadelphia*, 644 F.2d at 200. Second, "[t]he Supreme Court has repeatedly recognized the central role of Congress in establishing appropriate mechanisms to enforce the fourteenth amendment." *Id.* (citations omitted). Third, while exercising its authority to enforce the Fourteenth Amendment's prohibitions on many occasions, Congress has not granted the judiciary or the executive the type of authority to bring suit that the Justice Department now claims. *Id.* In *Philadelphia*, the United States had sued for declaratory and equitable relief under the Fourteenth Amendment with respect to the Philadelphia Police Department's allegedly discriminatory policies and practices; the court determined that the Justice Department did not have the authority to sue under the Fourteenth Amendment to protect the rights of third parties. The Third Circuit concluded that "it

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absent explicit statutory authority. United States v. Marion County School District, 625 F.2d 607 (5th Cir. 1980) (citing *Mattson* and *Solomon* but not on this point and deciding the issue on other grounds), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1980 (1981). Other circuits have mentioned the conclusions of the Third, Fourth, and Ninth Circuits, but have not ruled on the issue either. Hammon v. Barry, 826 F.2d 73, 76 (D.C.Cir. 1987) (declining to pass on the issue), *petition for cert. filed*, (Jan. 11, 1988); United States v. Massachusetts Maritime Academy, 762 F.2d 142, 147 n.4 (1st. Cir. 1985) (assuming that the defendants are correct in this contention); United States v. Ernst & Whinney, 735 F.2d 1296, 1300 n.10 (11th Cir. 1984) (noting the cases but finding them inapposite under the facts), *cert. denied*, 470 U.S. 1050, 105 S.Ct. 1748 (1985). Most recently, *the Justice Department itself conceded its Fourteenth Amendment claim* in a suit alleging discrimination in Alabama's public higher education system. United States v. Alabama, 828 F.2d 1532, 1547 (11th Cir. 1987), *petition for cert. filed*, (Jan. 19, 1988).

would be entirely inappropriate for a federal court to overrule the explicit decisions of Congress not to increase federal executive and judicial authority over state and local governments in this manner." *Id.*

Courts have concluded that the Justice Department does not have authority to bring suit to enforce the Fourteenth Amendment absent statutory authority because such authority would erode both separation of powers and the purposes of the Fourteenth Amendment. The Constitution created a system of separation of powers, envisioning that each branch would carry out its specialized function and that the activity of the three branches would be coordinated in a particular manner. Comment, *Nonstatutory Executive Authority to Bring Suit*, 85 Harv. L. Rev. 1566, 1570 (1972). The purpose of the document was to structure and diffuse power so as to secure liberty. *Bowsher v. Synar*, 478 U.S. 714, 106 S. Ct. 3181, 3186 (1986) (subsequently superceded by statute as noted in *National Association of Counties v. Baker*, 842 F.2d 369 (D.C.Cir. 1988)). The Justice Department's position would result in permitting the executive branch to determine public policy without congressional participation in the very areas in which the Constitution and the Fourteenth Amendment give Congress a significant role. *Mattson*, 600 F.2d at 1301; Comment, *supra*, at 1570.

The particular purposes of the Fourteenth Amendment also counsel against executive branch initiation of litigation with statutory authorization. Unlike the commerce clause, section 1 of the Fourteenth Amendment does not grant power to the national government; rather it is a guarantee of individual rights. *Mattson*, 600 F.2d at 1298; Comment, *supra*, at 1578. Second, section 1 is particularly directed at the states. The grant to enforce the amendment is given to Congress in Section 5. Because the amendment raises the delicate issue of federal-state relations, it is particularly appropriate that Con-

gress, and not the executive, set the parameters for enforcement because it is within the Congress that the states are represented. *Philadelphia*, 644 F.2d at 200; Comment, *supra*, at 1577.

Moreover, Congress has already clearly delineated the role of the executive branch with respect to racial discrimination in educational institutions. Under the Civil Rights Act of 1964, the Justice Department may bring suit, after observing certain procedural prerequisites, under either Title VI or Title IV. Title VI recognizes suits by the Justice Department pursuant to the power of Congress to regulate grant programs which the Congress funds. Title IV, 42 U.S.C. 2000c-6, permits the Attorney General to institute suit if an individual is denied admission or continued attendance at a public college on the basis of "race, color, religion, sex or national origin." *Id.* Prerequisites to the Attorney General's suit include a complaint signed by the individual or parent, notice to the institution, and a period in which the institution may remedy the condition complained of. The Attorney General may not avoid the prerequisites of Title IV by bringing suit under the Fourteenth Amendment. The First Circuit, in a sex discrimination action by the United States against an institution of higher education, assumed that if the Attorney General had no authority to sue under Title IV, as defendants contended, the Attorney General "would lack the inherent authority to maintain an action to enforce the fourteenth amendment rights of third parties." *United States v. Massachusetts Maritime Academy*, *supra* n.7, at 147 n.4. In the elementary and secondary school context, several courts have concluded that "to permit the government to asert constitutional claims . . . by suing directly under the Constitution would allow it to circumvent Title IV's procedural prerequisites to the asertion of equal protection violations in school desegregation cases." *United States v. Yonkers Board of Education*, 624 F. Supp.

1276, 1523 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987); *United States v. School District*, 577 F.2d 1339, 1345 (6th Cir. 1978).

Both these statutes, because they clearly delineate the executive branch's role in racial discrimination suits in educational institutions, negate an independent basis in the Fourteenth Amendment for executive branch initiation of such suits. The Justice Department, therefore, must base its suit on Title VI.

IX. SYSTEM-WIDE APPLICATION OF TITLE VI IS AN UNCONSTITUTIONAL EXERCISE OF CONGRESS' SPENDING POWER

A. The Civil Rights Restoration Act is Unconstitutional

Title VI of the 1964 Civil Rights Act provides that "[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The Board of Regents fully embraces this law and eschews racial discrimination of any kind, in any facet of public higher education, regardless of the presence or absence of federal financial assistance.

The dispute in this case is not over the fundamental precept that there should be no discrimination on the basis of race in public higher education, but over the charge that discrimination is at work, and that measures beyond those already implemented by the State of Louisiana must be imposed in order to eradicate it. The fact that the state has done so much to eliminate the vestiges of its formerly dual system of public higher education raises two prongs of opposition to the instant suit. First, having followed an aggressive and comprehensive affirmative plan to disestablish the dual system, the state has a

powerful defense on the merits against the charge of Title VI violation. Second, and equally important, is the state's resistance to the remedy that a finding of liability would compel. A finding of liability would necessarily condemn as inadequate the affirmative action approach the state has taken, and would therefore require a different remedy. Because the state's affirmative actions have been so far-reaching, there is little more than can be done to induce other-race students to enroll immediately in Louisiana's public institutions of higher education. There are a host of other options conceivable, all involving the restructuring of public higher education. These include merger of institutions, redefining their missions and standards, program transfers, and a number of variations on those themes. In order to fashion any such remedy the court would have to substitute its judgment for those of the state on a broad range of educational policy decisions.

The Board of Regents' resistance to the possible remedies that might be imposed stands on a constitutional footing. The uncertain and potentially radical intrusions into the state's entire complex of public higher education that might follow upon a finding of liability exceed the constitutionally permissible scope of Title VI.

The constitutional underpinning of Title VI is the taxing and spending clause of article I, section 8. That clause carries certain limitations which correspondingly limit the legislation Congress enacts under its authority. In enacting the recent Civil Rights Restoration Act, Pub.L. 100-259, 102 Stat. 28 (1988), which brings Louisiana's entire "system" of public higher education within the purview of Title VI, Congress overreached its constitutional authority. To understand how requires an examination of Title VI and its application prior to the amending legislation.

Prior to the Civil Rights Restoration Act, the Supreme Court and federal courts generally had reached a con-

sensus that the antidiscrimination conditions attached to federal grants applied only to specific programs or activities funded by those grants and not to entire institutions or systems. Thus, in monitoring the use of federal monies and in seeking compliance with antidiscrimination conditions, federal agencies were limited to scrutinizing the particular programs or activities within an institution which received the funds. Many courts considered this approach both fair and sensible. For example, the Eleventh Circuit recently applied the program-specific approach to limit the scope of Title VI in litigation by the Justice Department against the various state authorities governing Alabama's system of public higher education. *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987), *petition for cert. filed*, (Jan. 19, 1988). The Eleventh Circuit echoed the Supreme Court's conclusions concerning Title IX program-specific prohibitions against sex discrimination in educational programs or activities receiving federal funds. *Grove City College v. Bell*, 465 U.S. 555, 104 S.Ct. 1211 (1984). Title VI and Title IX contain similar statutory language.

In *Grove City*, the Supreme Court clarified two principles with respect to Title IX of the Education Amendments of 1972. First, Title IX applies to an educational institution even if the institution itself does not receive the federal funds directly, i.e., the students as individuals receive federal financial aid. Second, Title IX permits a federal agency to regulate the program or activity which receives the federal financial assistance, in this case, the college's financial aid program, but does not permit regulation of the entire college. The Court found no evidence that federal funds provided for one program necessarily diverted college monies into other programs. Moreover, allowing federal scrutiny of the entire college would defeat the program-specific nature of Title IX. The Supreme Court applied similar reasoning to section 504 of the Rehabilitation Act of 1973, 29 U.S.C.

§ 794, rejecting the argument that federal financial assistance to airport operators also resulted in federal regulation, under section 504, of all commercial airlines. *United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, 106 S.Ct. 2705 (1986). The Court found the plaintiff's argument "overbroad and unpersuasive," noting that "[i]t is by reference to the grant statute, and not to hypothetical collective concepts like commercial aviation or interstate highway transportation, that the relevant program or activity is determined." *Id.* at ——, 106 S.Ct. at 2714.

In light of these Supreme Court precedents, the Eleventh Circuit rejected the broad systemic approach to Title VI urged by the United States in *Alabama* and concluded that Title VI must be applied on a program-specific basis. In *Alabama*, the United States alleged that the defendants had not taken affirmative steps to eradicate the "dual system of higher education that resulted from the State's past policy of racial segregation." *Alabama*, 828 F.2d at 1534. The federal government sought both more funds for, and a transfer of programs to, Alabama's black colleges and universities. *Id.* The Eleventh Circuit rejected the federal government's claim, finding that mere allegations of the receipt of federal monies and of discrimination permeating the entire system of public higher education in the state were insufficient. The government had argued that all of Alabama's public colleges and universities as well as the various boards and officials who governed the system of public higher education constituted a program or activity which received federal funds and were therefore subject to Title VI regulation. The court noted that the federal government could cite no precedent in support of its position of this point.

Rejecting the government's attempt to conglomerate the numerous and varied higher education decision-making units into one system, the court sounded a theme

of fairness: blameless individuals and institutions should not be condemned on the basis of "broad 'associative' theories that have been soundly repudiated by the Supreme Court and lower courts." *Id.* at 1547. Relying on both *Grove City* and *Paralyzed Veterans*, the court found that the language of Title VI required program-specific application and rejected a definitional process based on "hypothetical collective concepts" rather than the grant statute itself. The Eleventh Circuit concluded that the United States, to satisfy Title VI, would have to restructure its complaint to identify the federally funded programs which were affected and to demonstrate how the actions of the defendant resulted in discrimination.

The Eleventh Circuit's rationale was two-fold. First, a program-specific examination of allegedly discriminatory actions assists the court to clarify the issues in complex litigation. Second, even more importantly, the program-specific approach "serves to protect innocent beneficiaries of programs *not* tainted by discriminating practices." *Id.* at 1551.

Buttressing the Eleventh Circuit's conclusion was the support the court found in Fifth Circuit precedent and that of other circuits with respect to Title VI higher education litigation. The Eleventh Circuit concluded that the program-specific requirement had been strictly enforced in the Fifth and, subsequently, the Eleventh Circuits since 1969. The Fifth Circuit in *Board of Public Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969), clearly envisioned Title VI as applying to individual programs within larger entities:

> If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper. But there will also be cases from time to time where a particular program, within a state, within a

> county, within a district, even within a school (in short, within a 'political entity or part thereof'), is effectively insulated from otherwise unlawful activities. Congress did not intend that such a program suffer for the sins of others. HEW was denied the right to condemn programs by association. The statute prescribes a policy of disassociation of programs in the fact finding process. Each must be considered on its own merits to determine whether or not it is in compliance with the Act. In this way the Act is shielded from a vindictive application. Schools and programs are not condemned en masse or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends. Under this procedure each program receives its own 'day in court.'

Id. at 1078. *Finch* involved a Title VI, section 602 termination by the federal agency of funds to a school district. In *Alabama*, the court explicitly noted that a

> review of title VI's legislative history reveals no intention to apply different standards to suits to achieve compliance and those to terminate funds. Nor can we perceive any reason why the program specificity requirement of title VI should be different for compliance actions and termination actions. Both types of cases are brought pursuant to title VI, and the same program specific language should apply regardless of the remedy sought.

Alabama, 828 F.2d at 1550 n.77.

The *court in Finch* added that an administrative agency must present factual findings that "a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory." *Finch*, 414 F.2d at 1079. Both the Su-

preme Court and the Fifth Circuit have subsequently cited *Finch* favorably.[10]

When Congress enacted the Civil Rights Restoration Act, it did so against this backdrop of both statutory and judicial definition which narrowed the scope of federal regulaiton to reasonable limits. A judicial consensus had developed on the meaning of program or activity which was both fair and sensitive to the interests of all involved parties. Moreover, the consensus on the definition reflected a concern for clearly specifying conditions imposed on federal grants as well as establishing a reasonable relationship between the federal interest in a particular grant program and the conditions imposed on the grant.

In broad, sweeping language, Congress has now acted to change well-understood language and to apply federal regulation on a system-wide basis, extending its purview of state higher education programs to unclear and unreasonable limits. By providing so broad a coverage for federal regulation through statutes based on Congress' spending power, the Congress has exceeded all reasonable limitations on its spending power and thus the Civil Rights Restoration Act is rendered unconstitutional. The conclusion follows from the application of Supreme Court precedent on the limitations inherent in Congress' spending power to the statutory language and implications of the Civil Rights Restoration Act.

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[10] North Haven Board of Education v. Bell, 456 U.S. 512, 538-39, 102 S.Ct. 1912, 1926-27 (1982) (holding "that an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902."); Bennett v. West Texas University, 799 F.2d 155 (5th Cir. 1986) (holding that Title IX did not apply to an athletics department when student athletes received federal financial aid); and Brown v. Sibley, 650 F.2d 760 (5th Cir.) (holding that a private plaintiff in section 504 Rehabilitation Act, 29 U.S.C. § 794, litigation must show that the relevant program itself received federal funds) *reh'g en banc denied*, (1981).

The Civil Rights Restoration Act amends Title VI of the Civil Rights Act of 1964. To reiterate, Title VI includes a provision that "[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d ("section 601"). The Civil Rights Restoration Act adds section 606 which redefines "program or activity" to "mean all of the operations of . . . (2) (A) a college, university, or other postsecondary institution, or a public system of higher education." *Id.* § 2000d-4a. The effect of the amendment is to submit an entire university system to federal regulation under section 601 if any of its programs receive federal assistance.

Title VI of the Civil Rights Act of 1964 and, by implicaiton, the Civil Rights Restoration Act were passed pursuant to Congress' spending power. The Supreme Court has acknowledged this conclusion after an examination of the legislative history of Title VI. *Guardians Association v. Civil Service Commission*, 463 U.S. 582, 598-99; 103 S.Ct. 3221, 3230, *cert. denied*, 463 U.S. 1228, 103 S.Ct. 3568 (1983); *see also United States v. Alabama*, 828 F.2d at 1547. The source of Congress' spending power is Article I, section 8, clause 1 of the Constitution which gives Congress the power "to lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the Common Defense and General Welfare of the United States . . . ." Since the earliest days of the Republic, the meaning of this clause has been debated. *United States v. Butler*, 297 U.S. 1, 64-67, 56 S.Ct. 312, 318-20 (1936); A. J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 Stan. L. Rev. 1103, 1111-13 (1987). However, even those who interpret the clause broadly acknowledge that the clause msut be limited in some fashion. To do otherwise would be to abandon the basic principle that the Constitution created a government of limited, not general, powers.

The debates about the nature and scope of the general welfare clause were put to rest in *United States v. Butler*, *supra*. The Court concluded that the phrase, "general welfare," modified the taxing and spending powers of Congress. The *Butler* court thus adopted a broad vision of the spending power, indicating that the spending power is not restricted to Congress' enumerated powers, but is subject to the condition that appropriations be for the general welfare. This broad view of Congress' spending power has persisted to the present and is not disputed here. *South Dakota v. Dole*, —— U.S. ——, 107 S.Ct. 2793, 2796 (1987); *Fullilove v. Klutznick*, 448 U.S. 448, 475, 100 S.Ct. 2758, 2772 (1980); *Buckley v. Valeo*, 424 U.S. 1, 90-91, 96 S.Ct. 612, 668-69 (1976).

Nonetheless, a certain tension between a broad concept of Congress' spending powers and the proposition that the government established by the Constitution is one of enumerated, not general, powers persists. For this reason, courts consistently read limitations into the spending power. *Butler*, 297 U.S. at 66-67, 56 S.Ct. at 319-20. The Supreme Court recently summarized these limitations in *South Dakota v. Dole*, *supra*. In *Dole*, the Supreme Court upheld the National Minimum Drinking Age Amendment, 23 U.S.C. § 158, against a challenge to its constitutionality based on both the 21st Amendment and Congress' spending power. The federal statute conditioned a state's receipt of a portion of its federal highway funds on a minimum state statutory drinking age of 21. South Dakota had a lower drinking age for 3.2 beer and brought suit challenging the constitutionality of the federal statute. In *Dole*, the court articulated four limitations on the spending power: (1) the general welfare, (2) the clearly stated condition, (3) the germaneness of the condition to federal purposes, and (4) the independent constitutional bar limitations.

Two of these limitations are not applicable to the instant facts. First, no contention is made that Congress

in passing the Civil Rights Restoration Act did not act for the general welfare. The determination of the general welfare is made by Congress and will be disputed by courts only if Congress is "clearly wrong" or displays "arbitrary power." *Helvering v. Davis*, 301 U.S. 619, 640, 57 S.Ct. 904, 908 (1937). Nor is it contended that an independent provision of the Constitution bars the constitutionality of the Civil Rights Restoration Act. The application of the Civil Rights Restoration Act is, however, precluded in the instant facts because the remaining limitations on Congress' exercise of its spending power are applicable.

First, requiring system-wide regulation of university system whose specific programs reecive federal monies is unconstitutional because the condition imposed by the United States—system-wide application of Title VI—is not a clearly stated condition and is thus ambiguous. Congress' power to impose conditions on grants is not disputed. The exercise of Congress' spending power frequently takes the form of grants to the states and, clearly, Congress may place conditions on federal grants. In *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 67 S.Ct. 544 (1947), the Court determined that Congress "does have the power to fix the terms upon which its money allotments to states shall be disbursed." *Id.* at 143, 67 S.Ct. at 553; *Lawrence County v. Lead-Deadwood School District No. 40-1*, 469 U.S. 256, 105 S. Ct. 695 (1985); *Guardians Association*, 463 U.S. at 600, 103 S.Ct. at 3231; *King v. Smith*, 392 U.S. 309, 333 n.34, 88 S.Ct. 2128, 2141 n.34 (1968); *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 78 S. Ct. 1174, *reh'g denied*, 358 U.S. 805, 79 S.Ct. 10 (1958). The *Dole* Court indicated that "[i]ncident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal

stattuory and administrative directives." *Dole*, 107 S. Ct. at 2796 (quoting *Fullilove*, 448 U.S. at 474, 100 S. Ct. at 2772).

However, Congress' power actually to impose a condition on a state is limited because the relationship between the federal government and the states in this context is contractual in nature. In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981), the Supreme Court concluded:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'

Id. at 18, 101 S.Ct. at 1540. The Court in *Guardians Association* explained that "receipt of federal funds under typical Spending Power legislation is a consensual matter: the State or other grantee weighs the benefits and the burdens before accepting the funds and agreeing to comply with the conditions attached to their receipt." *Guardians Association*, 463 U.S. at 597, 103 S.Ct. at 3229; *Chas. C. Steward Machine Co. v. Davis*, 301 U.S. 548, 590-591, 57 S.Ct. 883, 892 (1937).

Because the relationship is contractual, both parties must be aware of their undertakings. Therefore, the condition imposed on the receipt of the grant by the federal government must be clearly stated and unambigous. If it is not, Congress' ability to exercise its spending power in those circumstances is limited. *Dole*, 107 S.Ct. at 2796. The *Pennhurst* court noted: "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambigu-

ously." 451 U.S. at 18, 101 S.Ct. at 1540. The *Pennhurst* court delineated a rule of statutory construction: "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the states can knowingly decide whether or not to accept those funds." *Id.* at 25, 101 S.Ct. at 1543. The Court noted that this rule applies with greatest force when the "State's potential obligations under the Act are largely indeterminate." *Id.* The *Pennhurst* benchmark for evaluating Congress' actions under the spending power includes an examination of: (1) "whether Congress spoke so clearly that we can fairly say that the State could make an informed choice;" and (2) whether Congress' actions results in "surprising participating States with post acceptance or 'retroactive' conditions." *Id.* at 26, 101 S.Ct. at 1544.

The Court's decision in *Pennhurst* involved a federal-state grant program under the Developmentally Disabled Assistance and Bill of Rights Act. 42 U.S.C. § 6000. At issue was whether the Act created substantive rights for the mentally retarded. Relying on a Bill of Rights provision (section 6010) in the statute, the plaintiffs argued that they were entitled to "appropriate treatment" in the "least restrictive environment," which, in turn, required the state to expend money. *Pennhurst*, 451 U.S. at 9, 101 S.Ct. at 1535. The Court rejected the plaintiff's contentions, concluding that Congress spoke in precatory terms and that Congress did not condition federal funding on the states providing the rights discussed in section 6010.

The Civil Rights Restoration Act as applied by the Justice Department to the instant facts results in an ambiguous condition and is thus an unconstitutional application of Congress' power under the spending clause. System-wide application of Title VI to a state's entire higher education ssytem is an ambiguous condition because it is impossible for the state to know what the condition will entail. Federal policies applied in elementary and secondary school desegregation plans suggest the need for affirmative ac-

tion programs and busing. However, universities are diffeernt kinds of institutions with different kinds of student and faculty recruitment procedures, a fact that has been persistently recognized by courts. In the case of Louisiana, would the Congressional standard require merger of the university systems so that no predominantly black colleges exist? Would the standard require other major structural changes? Not only is the nature of the condition to be imposed unknown and debatable in theory, but also the parties to the instant litigation have, in fact, long debated what nondiscrimination means and how it can be achieved, without reaching a consensus on the matter. Therefore, both in theory and in practice, the condition of nondiscrimination is not clearly stated.

Very real problems of fairness also arise in retroactive application of the Civil Rights Restoration Act provision. First, if the statute which establishes a new standard of nondiscrimination is applied retroactively and the actions of the parties in the past are judged under the new standard, one type of retroactivity problem arises. It would be unfair to conclude that the State has not met its nondiscrimination obligations, presuming those are defined, if nondiscrimination within the entire system was not a condition of federal grants in the past. Secondly, another type of retroactivity problem arises if system-wide nondiscrimination is at present accepted as a condition of the grant, but is not defined clearly. To require system-wide nondiscrimination as a condition of a grant, then to define the condition subsequently, and to apply the condition retroactively is not only precluded by Supreme Court precedent on grant condition, but fundamentally unfair to the participating state institutions. In sum, the State of Louisiana cannot know what will be required of it either in terms of actions and expenditures if it accepts federal monies for educational specific programs. A state in dire financial straits would have to look carefully at such a potentially large obligation—unknown as it is—before deciding to continue to accept federal monies.

Second, system-wide interpretation of Title VI also exceeds Congress' spending power because the condition is not germane to the federal interest in the particular grant programs. The Supreme Court in *Dole* reiterated a germaneness or relatedness requirement that conditions placed on federal grants must meet in order to remain within the confines of Congress' spending clause power. System-wide application of the conditions of a grant when the federal monies are provided only for particular programs exceeds that limitation.

Numerous courts have articulated the nature of this limitation. In *Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153 (1978), the Court required that conditions be "reasonably related to the federal interest in particular national projects or programs." *Id.* at 461, 98 S.Ct. at 1164. In another context, the Court acknowledged "that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof." *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 295, 78 S.Ct. 1175, 1185, *reh'g denied*, 358 U.S. 805, 79 S.Ct. 10 (1958); *see also Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 67 S.Ct. 544 (1947).

This limitation on Congress' spending power requires that the conditions imposed by Congress be reasonable and relevant to the federal interest in the funded programs and, more specifically, relate directly to the purpose of the expended funds. Although the outer limits of the germaneness requirement have not yet been defined by courts, this limitation arguably applies to the Civil Rights Restoration Act. *Dole*, 107 S.Ct. at 2797 n.3.

The Board of Regents does not dispute that Congress has a valid interest in regulating educational programs for which it provides funds. However, it is both unreasonable and irrelevant to the federal interest to leap from federal regulation of a funded program to federal regulation of a state's entire higher education system. That

system, a product of decades of both political and bureaucratic decision-making processes, is a complex system whose independent parts make educational policy independently. Indeed its components make independent decisions about whether to apply for federal funds as well as what types of federal funding programs are most beneficial. First, to find fault in one part of the system, to attribute that fault to another part of the system, and then to sanction the innocent parties is an unreasonable exercise of legislative power in a democratic system. Second, to extend federal regulation by imposing conditions which stretch the federal regulatory reach far beyond the funded program is plainly overreaching. This is unreasonable and coercive in a context in which the states and the federal government stand in a contractual relationship. In effect, the state is faced with the choice of compliance with a vastly wider scope of federal regulation or abandoning much needed federal monies. Thus, the Civil Rights Restoration Act effects a silent but radical shift in state and federal responsibilities with respect to public higher education. Finally, the extent of federal overreaching is not related to the purposes for which grant money is allocated. Federal education grants serve primarily to enhance educational opportunities and the quality of higher education. Federal monies are expended for particular programs and purposes. Because federal monies are expended in those programs, Congress' authority under the spending power also extends to those programs. Congress' spending power extends no further.

Prior to the Civil Rights Restoration Act, Title VI provided powerful means by which the federal government could assure that its monies would not be spent for discriminatory purposes. The Civil Rights Restoration Act does not, in fact, restore civil rights. Rather the Act permits a major restructuring of public higher education. In the present context, the effect of the application of the Act would be to simplify a very complex problem, to ignore the progress that has been made in Louisiana

higher education, and to give to the courts rather than the state itself the power to make higher education policy in Louisiana. A program-specific approach to Title VI is fairer and squarely within the scope of Congress' spending power.

B. The Supreme Court Has Already Read Title VI As Expansively As It May Constitutionally Be Read

A cardinal rule of constitutional law and statutory interpretation is relevant in the instant case. In *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407, 29 S.Ct. 527, 535 (1908), the Supreme Court stated, "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity." (Citing *Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 187 U.S. 197, 23 S.Ct. 108 (1902).) *See also, e.g., United States v. Security Industrial Bank*, 459 U.S. 70, 103 S.Ct. 407 (1982); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 101 S. Ct. 2142 (1981); *Califano v. Yamaski*, 442 U.S. 682, 99 S.Ct. 2545 (1979); *United States v. International Union United Automobile, Aircraft & Agricultural Implement Workers*, 352 U.S. 568, 77 S.Ct. 529 (1957); *United States v. Rumely*, 345 U.S. 41, 73 S.Ct. 543 (1953); *Kovacs v. Cooper*, 336 U.S. 77, 69 S.Ct. 448 (1949); *Crowell v. Benson*, 285 U.S. 22, 52 S.Ct. 285 (1932).

This principle informed the Supreme Court's action in *Grove City* when it was required to define the scope of a Title IX "program." Although the issue was not framed in terms of the constitutionality of the statute, the choice faced by the court between narrow and expansive definitions of "program" directly addressed Con-

gress' power to regulate under the spending clause. Rejecting the view of the court of appeal that the entire institution was covered by the term "program," due to the economic ripple effect of BEOG grants, the Supreme Court held that Title IX coverage and Congress' power to regulate was limited to the specific department receiving federal aid.[11] The Court necessarily determined that the economic ripple effect of federal spending in one area of an institution is not a sufficient exercise of the spending power to extend the federal regulations which accompany that spending to other areas of the institution. That is, system-wide regulation without direct system-wide spending would be unconstitutional under the spending power. Thus, in choosing the program-specific application of the statute, which maintained the necessary equilibrium between spending and regulation, the Court elected the interpretation which would preserve the constitutionality of the statute. The other option, which would have extended Congressional regu-

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[11] A similar argument has been posited, and likewise rejected, by the Supreme Court in the Establishment Clause cases involving aid to parochial schools. The opponents of government aid argued that the funding of items such as programs, textbooks, transportation, or buildings, having a strictly secular purpose, would free up money for the institution to use in furthering its religious purpose. Wolman v. Walter, 433 U.S. 229, 97 S.Ct. 2593 (1977); Committee for Public Education v. Regan, 444 U.S. 646, 100 S.Ct. 840 (1980); Board of Education v. Allen, 392 U.S. 236, 88 S.Ct. 1923 (1968); Everson v. Board of Education, 330 U.S. 1, 675 S.Ct. 504 (1947); Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091 (1971); Hunt v. MvNair, 413 U.S. 734, 93 S.Ct. 2868 (1973). As in *Grove City*, the Court has implicitly defined "program" and limited its scope, recognizing that the tenuous ripple effect of such aid did not warrant terminating that aid or interfering in the operation of the entire institution. If the Establishment Clause of the First Amendment—a carefully guarded limitation on government spending—could not reach into an entire system or institution, although spending in one department may indirectly affect others, then the reach of Title VI, passed pursuant to Congress taxing and spending power can extend no further.

lation based on spending beyond areas where federal monies were actually spent, was implicitly rejected by the Court as an unconstitutional interpretation of the statute.

Congress cannot circumvent the result of *Grove City* by simply redefining the term "program" to include an entire university system or institution. The constitutional limit of Congress' authority to regulate under its spending power was already reached by the Court's definition in *Grove City* requiring program specificity. If the Supreme Court had confronted only an issue of statutory intent, the Congress could pass new legislation saying that the Court had misinterpreted its will; but Congress cannot legislatively overrule a constitutional pronouncement.

To summarize, prior to the Civil Rights Restoration Act, the term "program" was susceptible of two definitions: one constitutional, the other not. In *Grove City*, the Supreme Court assigned a definition to the term which was coterminous with the constitutional limits of Congress' authority to regulate under the spending power. Congress' attempt to evade the limitation by redefining "program" in the Civil Rights Restoration Act is unconstitutional.

X. THE JUSTICE DEPARTMENT LACKS STANDING TO BRING THIS ACTION

It is axiomatic that a litigant must meet the standing requirements of article III, section 2 of the United States Constitution in order to prosecute a claim in federal court. Specifically, he must allege facts in his complaint that demonstrate 1) a distinct and palpable injury-in-fact, 2) which is fairly traceable to an alleged wrongdoing, and 3) which is redressable by the relief requested. *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315 (1984). "In this manner does Art. III limit the federal judicial

power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.' . . . It tends to assure that the legal questions presented to the court will be resolved not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. . . . Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of 'standing' would be quite unnecessary. But the cases and controversies language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums." *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472-73, 102 S.Ct. 752, 758-59 (1982). These elements must exist throughout the litigation, not just at the filing of the complaint. *Tucker v. Phyfer*, 819 F.2d 1030 (11th Cir. 1987); *Safir v. Dole*, 718 F.2d 475 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206, 104 S.Ct. 2389, reh'g denied, 467 U.S. 1268, 104 S.Ct. 3563 (1984). Therefore, while a party may originally possess standing, a circumstantial change or factual development may later divest him of standing to continue prosecuting his claim. For this reason, an objection to a party's lack of standing may be raised at any time during the litigation, by any party, or even by the court *sua sponte*.

In this action, the Justice Department cannot satisfy either the traceability or redressability requirements of standing.[12] Its standing having been challenged, the Justice Department now has the burden of proving in-

[12] The existence of an injury-in-fact is not placed at issue in this motion for summary judgment, because it involves material facts which undoubtedly would be contested and unresolvable on summary judgment.

jury, causation, and redressability. *See, Steele v. National Firearms Act Branch*, 755 F.2d 1410 (11th Cir. 1985), *citing*, C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure*, § 3522 at 63-65 (1984). Furthermore, the Supreme Court has required that the plaintiff plead these elements in its complaint with a fair degree of specificity. *See, e.g., Allen*, 468 U.S. at 758, 104 S.Ct. at 3328; *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-45, 96 S.Ct. 1917, 1925-28 (1976); *Warth v. Seldin*, 422 U.S. 490, 504-07, 516-17, 95 S.Ct. 2197, 2208-09, 2214-15 (1975). This is a burden the Justice Department cannot meet at all, and certainly not on the face of its present pleadings.

A. Causation/Traceability

The necessity of alleging a fairly traceable injury to challenged conduct was underscored recently by the Supreme Court in *Allen, supra*. The plaintiffs, parents of black public school students, challenged the federal government's tax exemption procedures regarding racially discriminatory private schools. They alleged an injury based on the segregated educational opportunities for white students who avoided attendance in the public schools. While the court acknowledged that the diminished opportunity to receive an education in a racially integrated school is a judicially cognizable injury, it found that plaintiffs failed to establish causation between that injury and the government's tax exemption that procedures. "The diminished ability of respondents' children to receive a desegregated education would be fairly traceable to unlawful Internal Revenue Service grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration." *Id.* at 758, 104 S.Ct. at 3328. The court buttressed its reasoning with redressability considerations, noting, "it is entirely speculative . . . whether

withdrawal of a tax exemption from any particular school would lead the school to change its policies." *Id.* The court then explained that the chain of causation was weakened by the presence of numerous third parties, namely, private school officials and parents of private school children, all making independent decisions whose collective effect could not be measured. *Id.* at 759, 104 S.Ct. at 3328.

In the instant case, the United States has alleged that defendants are in violation of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment of the United States Constitution on the grounds that a racially dual system of higher education was established prior to 1953 and still exists today. As in *Allen*, however, these claims do not sufficiently allege the traceability element of standing for two reasons. The extent to which the present racial identifiability of Louisiana's institutions of higher learning is attributable to official policies of the past is unknown because Louisiana has taken positive steps and made good faith efforts to reverse the effects of those policies and has created a unitary system. The state's efforts interrupted the chain of causation between *de jure* segregation and today's segregation by student choice, which is dictated by social, economic, and other factors beyond the state's control.

Where there has been past *de jure* segregation, the plaintiff must also allege that the defendant "failed to take positive steps 'to eliminate from the public schools all vestiges of [that] state-imposed segregation.'" *Los Angeles Branch N.A.A.C.P. v. Los Angeles Unified School District*, 714 F.2d 946, 948 (9th Cir. 1983), *quoting*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 1275 (1971). Unlike the instant case, the plaintiff in *Los Angeles Branch N.A.A.C.P.* did state a traceable injury by sufficiently alleging facts which would support a finding of both 1) intentional acts by defendants which resulted in *de jure*

segregation and 2) failure to take positive steps toward desegregation. Plaintiff in the instant case should not be allowed to ignore the numerous positive efforts made by defendants, which have, in fact achieved a unitary system.

A similar issue was addressed, although not framed in terms of standing, in *Artis v. Board of Regents*, No. 479-251, slip opinion (S.D. Ga. Feb. 2, 1981). In *Artis*, the defendant Board of Regents was accused of operating a dual system of public colleges in Savannah, Georgia. The court noted in its findings of fact that Georgia originally operated the schools in question under *de jure* segregation and that they had remained racially identifiable. *Id.* at 3. The court then considered the efforts made by defendants since 1971 to change the clear racial identities of the institutions, which statistically had little impact on the racial composition of the schools. *Id.* at 4-5. Given this evidence, the court concluded that the individual student decisions, not allegedly unconstitutional conduct by the defendant, was responsible for the racial identifiability of the institutions. *Artis* held that past *de jure* segregation was not sufficient to impose liability as a present constitutional violation, especially where the defendants engaged in affirmative acts with the intent to compensate for its prior segregative policies. The fact that a segregated system still existed in Georgia could not render the defendants liable without proof that it had been caused by the defendants' actions—particularly where the evidence indicated that sociological factors beyond the defendants' control undermined their affirmative efforts. Having established this causation prerequisite to liability, *Artis* should now be incorporated in standing analysis as a specific application of the traceability requirement in desegregation cases.

A similar result has been reached in the area of housing desegregation, which is particularly analogous to higher education because in both situations the subjects

of desegregation efforts are free to "vote with their feet" on the success of those efforts. In *Jorman v. Veterans Administration*, 830 F.2d 1420 (7th Cir. 1987), *affirming*, 654 F.Supp. 748 (N.D. Ill. 1986), the court faced the phenomenon labeled "resegregation" whereby a segregated all-white neighborhood becomes a segregated all-black neighborhood due to "white flight." The plaintiffs in that suit alleged that the FHA and VA failed adequately to monitor their home-loan guarantee programs. The district court held that the plaintiffs did not have standing, on both traceability and redressability grounds. The Seventh Circuit affirmed the order to dismiss on traceability grounds, noting that it was unnecessary to consider redressability if no causation existed. *Id.* at 1422, n. 2. Defendants' expert testified that the increase of government loans was merely a symptom, not the cause of resegregation. Instead, he attributed "white flight" to the fears of white homeowners of a loss of property value or status that might result from integration. The district court accepted the testimony of defendants' expert over that of the plaintiffs, noting that "resegregation fundamentally was caused by blacks' desires to find better housing in the city, coupled with whites' intolerance of a certain level of minority population." *Id.* at 1423. These independent decisions of residents, not the conduct of defendants, caused resegregation, therefore the injury was not fairly traceable to defendants' conduct and plaintiffs had no standing.

Student choices for which the state is not, and cannot be made, answerable are also at work in this case. The state, having taken positive steps to end discrimination and establish a unitary system, is not responsible for the racial identifiability of its institutions. The chain of causation has been broken, the alleged injury is not "fairly traceable" to the state's conduct any longer, and standing does not exist.

B. Redressability

A close relationship has been noted between the causation and redressability requirements of standing because in most cases it can be inferred that correction of the alleged conduct will actually afford relief. *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982), *citing Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 74, 98 S.Ct. 2620, 2631 (1978) and *Legal Aid Society v. Brennan*, 608 F.2d 1319, 1335 (9th Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3010 (1980). However, while causation addresses the relationship between the parties, i.e., the plaintiff's injury and the defendant's conduct, redressability addresses the existence of a remedy and the court's power to right the claimed injury. *Gonzales*, 688 F.2d at 1267. In the instant case, defendants have long since terminated any discriminatory practices and have even taken positive steps to establish a unitary system of higher education. Over the past 6½ years, the state's efforts have been largely directed by the Consent Decree, which was heralded in 1981 as an excellent plan: "The plan itself appears to be a sound one for achieving a unitary system of public higher education within a Constitutionally acceptable timetable. The Consent Decree provides a reasonable and comprehensive statewide approach to both the systematic integration of the Louisiana higher educational system, and the enhancement of its traditionally Black institutions." *United States v. Louisiana*, 527 F.Supp. 509, 514 (E.D. La. 1981) (three-judge court). However, compliance with this plan only served to intensify the raical identifiability of the state's institutions. The Justice Department has no standing to seek more of the same relief, which has been proven to worsen, not remedy, the alleged injury. *Gonzales*, 688 F.2d at 1267, *citing, NAACP, Boston Chapter v. Harris*, 607 F.2d 514, 520 (1st Cir. 1979); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1608 (1978); *Duke Power Co.*, 438 U.S.

at 78, 98 S.Ct. at 2633; *Bowker v. Morton*, 541 F.2d 1347, 1349 (9th Cir. 1976). Moreover, the efficacy of other available remedies such as merger and program transfer is subject to grave doubt. Thus, even assuming an injury and causation, the power of available remedies to redress it is highly questionable.

In *Morgan v. McKeigue*, 726 F.2d 33 (1st Cir. 1984), the First Circuit vacated a district court order where the record did not contain facts which supported the necessity or appropriateness of the order in question to further desegregation goals. In this school desegregation case, the district court created a Citywide Parents Council and ordered an automatic and indefinite funding of approximately $500,000 per year "for subsequent years." *Id.* at 34. The court noted that, "better quality education as a general goal is beyond the proper concern of a desegregation court. . . . While active parental involvement in the educational policy of the Boston Public Schools may be a laudable goal, the district court does not, as a general proposition, possess remedial powers to effectuate that goal." *Id.* at 34-35. A judicial remedy must effectuate desegregation, and the order must be based on facts which support that conclusion.

It appears that the only method which might compel rapid integration is merger of the PBI's and PWI's. Plaintiff has not specifically requested this remedy and may not want to; and the Board of Regents submits that this measure is so drastic and potentially dangerous in an area of sensitive state policy decisionmaking that this court should refrain from imposing such a remedy. *See* Section IV, *supra.* Judge Wisdom recognized the importance of judicial restraint in education in *Bush v. Orleans Parish School Board*, 308 F.2d 491 (5th Cir. 1962) stating in that desegregation case, "It is especially not the business of federal courts how a state operates its schools or experiments with educational theories: as long as the state and its agents do not violate the Constitution." *Id.*

at 500. These sentiments were echoed by the three-judge court in *ASTA*, 289 F.Supp. 784 (M.D. Ala. 1968). That court refused to enjoin the construction of a four-year, degree-granting extension of Auburn University, explaining,

> In deciding to open a new institution or build a branch or expand an existing institution, and in deciding where to locate it, the legislature must consider a very complicated pattern of demand for and availability of the [goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements] including, also, impact on the dual system. We conclude that in reviewing such a decision to determine whether it maximized desegregation we would necessarily be involved, consciously or by default, in a wide range of educational policy decisions in which courts should not become involved.

Id. at 788. Given the evidence that Louisiana used all permissible means of encouraging desegregation, plaintiff's alleged injury is not judicially redressable. Without a feasible remedy, plaintiff has no standing before this court.

XI. STANDARD FOR GRANTING SUMMARY JUDGMENT

The Fifth Circuit recently stated:

> As a matter of federal procedural law, the granting of a summary judgment . . . is proper when, viewed in the light most favorable to the party opposing the motion, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.

Phillips Oil Co. v. OKC Corporation, 812 F.2d 265, 272 (5th Cir. 1987), cert. denied, 108 S.Ct. 152 (1987). The moving party must show the lack of actual dispute with respect to material facts. *Impossible Electronics Tech-*

niques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1025, 1031 (5th Cir. 1982). The court must give the non-movant the "benefit of all reasonable doubt in determining whether a genuine factual issue exists." *Phillips Oil, supra*, 812 F.2d at 272. To deny summary judgment, the factual dispute must be about a genuine issue of material fact. The "materiality" element requires that "only those disputes over facts that might affect the outcome of the lawsuit under governing substantive law will preclude summary judgment." *Id.* at 272. Therefore, unnecessary or irrelevant fact disputes do not preclude summary judgment. An evaluation of "genuineness" begins with the question of whether there is a need for trial. "No genuine issue for trial exists unless there is sufficient evidence favoring the non-moving party for a fact finder to find for that party." *Id.* at 273. Another Fifth Circuit decision also addressed the issue of "genuineness" of a fact dispute:

> An issue is genuine if the evidence supporting its resolution in favor of the party opposing summary judgment, together with any inferences in such party's favor that the evidence allows, would be sufficient to support a verdict in favor of that party. If, on the other hand, the evidence offered by both the moving and opposing parties would support only one conclusion and, even if all the evidence to the contrary is fully credited, a trial court would be obliged to direct a verdict in favor of the moving party, the issue is not genuine.

Professional Managers, Inc. v, Fawer, Brian, Hardy & Zatzkis, 799 F.2d 218, 222 (5th Cir. 1986).

In *Romano v. Merrill Lynch Pierce Fenner & Smith*, 834 F.2d 523 (5th Cir. 1987), the Fifth Circuit upheld a summary judgment for a broker on a churning claim by an investor. The investor, who had received notices of the transaction and was a sophisticated investor,

claimed he was unaware of the churning. The court concluded:

> Clearly, a party opposing summary judgment cannot rest on such a conclusory allegation when it is unsupported by facts placed before the trial court.

Id. at 529.

In the instant action, there is no dispute that for many years the State of Louisiana has implemented racially nondiscriminatory policies and practices, and has taken affirmative steps to promote integration of its system of public higher education. There is no dispute concerning the State's commitment and expenditure of hundreds of millions of dollars for enhancement of the predominantly black institutions. The statistical information regarding the racial mix of students and faculty at the State's institutions of higher education are likewise not in dispute. Further, it is undisputed that the attendance patterns of the institutions are due to the individual choice of students, rather than the policies of the State.

The issue before the Court is that of the substantive law to be applied to the undisputed facts. Trial of this matter is unnecessary, for there are no determinations of credibility to be made. Because this is a non-jury trial, the Court may grant summary judgment because the evidentiary facts are undisputed and a trial would not enhance the ability of the Court to make inferences and draw conclusions. *Phillips Oil, supra,* at 274 n. 15, citing *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124 (5th Cir. 1978) and *Houston North Hospital Properties v. Telco Leasing, Inc.*, 680 F.2d 19, 22 (5th Cir.).

This matter is ripe for summary judgment.

XII. CONCLUSION

The Justice Department bases this action on the loose allegation that Louisiana created and has maintained a "dual system" of public higher education. It imported

that term from cases involving elementary and secondary education, where "dual system" clearly denoted separate institutions for black and white students. In the elementary/secondary school context, the dual system was created by assignments of students on the basis of race and it could only be disestablished by reversing that process.

In public higher education, students have never been assigned to institutions and cannot be so assigned. Segregation was achieved by restricting student choice, and that barrier has long since been removed. What, then, does the Justice Department mean by its charge that Louisiana is operating a "dual system of public higher education"? It cannot mean that the state is restricting access to its institutions, for it is not. It cannot mean that the state is implementing racially discriminatory policies and practices with respect to its institutions of higher learning, for it is not. It cannot mean that the racial identifiability of the state's public institutions persists, for the racial compositions of the student bodies are determined by student choice, which is determined by social, economic, and other factors over which the state has no control. "Dual system" has no meaning in the context of public higher education today.

Not only has Justice failed to define the "dual system" Louisiana is charged with maintaining, it has also failed to define the "unitary system" it fixes as a goal. It cannot mean that a certain mix of students must be achieved at particular institutions, for Justice will concede that precise quotas are not required. It cannot mean that the state's predominantly black institutions must be made "equal" to the predominantly white institutions, for the concept of "separate but equal" has been rejected. What then can it mean but that the state must apply racially neutral policies and practices to admissions, governance, funding, and facilities? *What can it mean but what the State of Louisiana has already done?*

If the elimination of the "dual system" and the establishment of a "unitary system" means that an effort must be made to eliminate the racial identifiability of the state's institutions of public higher education, it means something that *none* of the parties to this litigation are seeking. It means influencing student choice not by inducement but by altering students' options. It means the elimination, merger, or other restructuring of institutions. It means overriding the educational decisions of state policy-makers. It means jeopardizing the quality of education in Louisiana. And if the experience of other states is any guide, it probably does *not* mean integration, but some new form of segregation. Until the social and other factors that motivate students to choose segregated environments are eliminated, racially identifiable institutions will persist.

The Justice Department has not shown that Louisiana is responsible for the ill-defined "dual system" and it has not articulated the remedy it seeks will achieve the ill-defined "unitary system." It does not have standing to proceed with this action until it shows that Louisiana has committed some present wrong and that a remedy exists to right that wrong. The Justice Department has not made these showings because it cannot. It has bitten off all of public higher education in Louisiana (overreaching its authority under Title VI and inventing its authority under the 14th Amendment) and now is simply trying to chew it, to no clear purpose. But the parties who are being chewed on in this action have the right to ask, where are we going with this? What is the purpose? Is there any plan for achieving that purpose? Will it work?

These questions are particularly pressing because the last plan drafted by the Justice Department, the Consent Decree, cost the state hundreds of millions of dollars it could not afford and undermined the gains the state had made in desegregation.

The most difficult issue in this litigation, the issue of remedy, is not before this Court in the cross motions for summary judgment, but neither can it be avoided in addressing the issue of liability. The remedy conundrum for public higher education has led the most careful jurists, including the United States Supreme Court, to conclude that nondiscriminatory policies and practices are all the Constitution requires. Courts that ventured into the radical remedies of institutional restructuring risked havoc and wreaked havoc.

Louisiana has done all that the law requires and more. It should be left to continue on the course that promises to achieve good results without jeopardizing educational quality.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for each party to this action, by hand delivery or express mail, this 13th day of May, 1988.

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89-556 (3)

89-557 (3)

Nos. 89-

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF LOUISIANA, *ex rel.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee.

AND

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee.

On Appeal from a Three-Judge Panel of the United States District Court for the Eastern District of Louisiana

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JOINT APPENDIX TO JURISDICTIONAL STATEMENT

(Volume II, pp. 533a-1163a)

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

UNITED STATES' MEMO IN OPPOSITION TO THE BOARD OF REGENTS' MOTION FOR SUMMARY JUDGMENT

[Filed June 7, 1988]

The United States, plaintiff herein, hereby submits its Motion in Opposition to the Board of Regents' Motion for Summary Judgment.[1]

For the reasons set out in the attached Memorandum in Support of the United States' Opposition to the Board of Regents' Motion for Summary Judgment, the United States' Response to the Board of Regents' Statement of Material Facts, the United States' Motion for Summary

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[1] We should note that the Board of Regents is only one defendant in this case, and its motion does not state that all other defendants, specifically the State, join in the motion.

Judgment, the United States' Memorandum in Support of Motion for Summary Judgment, the United States' List of Material Facts, and in the interest of justice, the United States prays this Court to enter an order denying the Board of Regents' Motion for Summary Judgment.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

MEMORANDUM IN SUPPORT OF THE UNITED STATES' OPPOSITION TO THE BOARD OF REGENTS' MOTION FOR SUMMARY JUDGMENT

The United States, plaintiff herein, hereby submits its Memorandum in Support of the United States' Opposition to the Board of Regents' Motion for Summary Judgment.[1]

ARGUMENT

1. *Liability.* The United States wishes to make two overreaching points in this response. First, in our view the Board of Regents (Board) in its Memorandum in Support of its Motion for Summary Judgment has confessed liability. In the first sentence of its Memorandum, the Board states that "Louisiana once maintained a *de jure* segregated system of public higher education . . . ."

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[1] The United States hereby incorporates by reference herein its Memorandum in Support of the United States' Motion for Summary Judgment (attached hereto as Attachment A) and the List of Material Facts (attached hereto as Attachment B).

In the second sentence, the Board states that "the racial identifiability of Louisiana's public colleges and universities persists today . . . ." Having described these facts as undisputed, the Board concludes in the third sentence that the instant controversy "revolves around the proper means of achieving a racially integrated system."

The United States agrees with these facts and supports the Board's characterization of the nub issue which will ultimately be before the Court. If it is conceded that the vestiges of past discrimination remain and that a racially integrated system has not yet been achieved, then—for the reasons discussed at pp. 4-11 of our Memorandum in Support of Motion for Summary Judgment—it is clear that the Board's motion must be denied and ours granted, for the Board has conceded that defendants have not met their equal protection obligations.

Our second overreaching point is that, while we do not agree with the Board's evaluation of the actions of the institutions, management boards, legislature, governors, and the Board with respect to the actions to implement the requirements of the 1981 Consent Decree, the United States does agree that the Consent Decree as implemented by the State of Louisiana and its various entities has not achieved the projected results and intended purpose of the Decree. It is the position of the United States, however, that it is the failure of the State of Louisiana to fully and appropriately implement the requirements of the Consent Decree that is to blame for that failure.

Boiled down to its essentials, the Board's position is that this Court should grant it summary judgment because, while the Board has conceded that the State has failed to dismantle its dual system of higher education and fully implement the Consent Decree which the parties agreed would do so, this Court should itself despair of being able to fashion an acceptable remedy for doing so.

This view is epitomized at page 5 of the Board's Memorandum, wherein the Board pleads that "the court should not intervene in this case." This is symptomatic of the Board's misunderstanding of the facts of this litigation, the applicable federal law, and the power and authority of the federal courts. The United States submits that it is hardly at issue whether this Court should "intervene" in this case. The Court has had jurisdiction of this case since 1974 and does not stand in the position of a proposed intervenor, but is the finder of fact and adjudicator of the law. While the Board questions the Court's ability to remedy the admitted liability of the State and then devotes a substantial portion of its Memorandum to a discussion of remedies which the Board alleges have been unsuccessful, the United States submits that a discussion of various remedy concepts is premature and irrelevant at this point. Similarly, the United States further submits that the discussion of specific actions taken or not taken in other circumstances (*viz*, Georgia and Tennessee) and not before this Court is clearly irrelevant here. While the Board may disagree—wrongly, in our view—with the remedy it agreed to implement in the Consent Decree, it is quite fanciful for it to suggest that therefore it can be required to implement *no* remedy and should be absolved of *all* liability.

2. *The United States' Remedy.* The discussion and characterization of the Justice Department's alleged theory of remedy in Section V is at best irrelevant; aside from that, the characterization is also wholly inaccurate. It is irrelevant simply because an evaluation of competing remedies is not before the Court at this time. It is inaccurate for a variety of reasons, discussed below.

The United States wholly disagrees with the Board's characterization of the principal aim of the United States' remedy theory. That aim is in fact nothing more or less than desegregation of the public higher education institu-

tions, thereby creating a unitary system of public higher education devoid of vestiges of the former dual system. Enhancement is but one component of the process of eliminating the vestiges of the former dual system and creating PBIs[2] which are able to compete for students, black and white, on an equal footing with the PWIs.[3] In addition to enhancement, we would note that programs at different institutions can be combined or reallocated in ways to encourage nonminorities to go to PBIs and minorities to go to PWIs—without wholesale institutional merger.[4]

The Board alleges that the United States' theory has been proven not to work and cites the failure of the Consent Decree programs.[5] But, the Board also admits that it has not fully met its requirements under the Consent Decree. In our view, it is that failure which must be blamed for the fact that the dual system remains undismantled.

The Board cites specifically the affidavit of Sharon Beard and the attachments thereto as support for its evaluation that the programs of the Consent Decree did not work. However, a review of Attachment B to Sharon Beard's affidavit indicates that there has been some, albeit insufficient, progress under the Consent Decree,

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[2] Predominantly Black Institutions.

[3] Predominantly White Institutions.

[4] We also note that, contrary to the Board's suggestion, while the United States has repeatedly indicated that institutional merger is not a remedy which is legally required, we have never indicated that there has ever been any evaluation of the educational soundness or value of institutional merger.

[5] This arguement by the Board is troubling indeed. The Consent Decree was not a "mandate" of the United States, it was a "compromise" which resulted from extensive and vigorous negotiations between all parties, including the Board. The Board joined in the request that the Consent Decree be approved by the Court.

even though it has not been fully implemented. Between 1981 and 1987, for instance, the white student enrollment has increased at each of the PBIs. While the black student enrollment has declined at all but two for the PWIs managed by the Board of Trustees for Colleges and Universities, the black student enrollment has increased—again, albeit insufficiently—at three of the five campuses in the Louisiana State University system. This information can hardly be considered decisive and wholly supportive of the Board's allegation that the process will not work.

The Board also asserts that the United States substitutes the interests of the PBIs for the interests of the students the PBIs serve. This assertion is of course baseless. The touchstone of this litigation has always been the provision of equal educational opportunities to all of the citizens of Louisiana, black and white. But it is also true that the institutions are the conduits for that provision; if the institutions are endowed by the State with equitable resources then the educational opportunities will be better provided—and provided unfettered by the vestiges of the former dual system. Thus, the United States has sought to make all of these institutions of higher education competitive so that equal educational opportunities may be provided to all.

The process and result do not contain any semblance of the illegal separate but equal doctrine. As explained in our Memorandum in Support of Motion for Summary Judgment, the aim is to ensure that attendance chioces by students are made in a truly unfettered fashion, which in turn requires that the State affirmatively remove the effects of past disparities and duality that still serve to discourage nonminorities from attending PBIs and vice versa.[6] The United States avers that

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[6] The Board's extended discussion of how higher education differs from primary education is curious in light of the fact that we

should the State implement the process properly, with the necessary and appropriate State support, the State will be able to fulfill these obligations.

3. *Constitutionality of the Restoration Act.* The Board's assertions with respect to the constitutionality of the Civil Rights Restoration Act of 1987[7] are likewise wholly without merit. The Board alleges the Restoration Act is unconstitutional because it lacks here a "clearly stated condition" and "germaneness of the condition to federal purposes."

But the Board's own discussion of the first limitation demonstrates that there is no ambiguity in the Board's undertsanding that the Restoration Act extends the coverage of Title VI to all facets of the institution and/or the system of public higher education. Moreover, there is no ambiguity in this respect stemming from the construction of the Restoration Act.[8] It is quite clear what the condition is: the State cannot deny equal protection of the laws in its system of higher education. Not only is this condition clear but, as discussed *supra*, it is also quite clear that the Board concedes it has violated and is violating this condition by continuing to operate a system from which it has failed to eliminate the vestiges of past discrimination.[9]

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forthrightly agreed in our Motion that the two are subject to different legal standards. What we dispute is the Board's apparent belief that open admissions alone will *ipso facto* remove all discriminatory vestiges.

[7] Hereafter Restoration Act, copy attached as Attachment C.

[8] See Section IV paragraph 2 and Section VI B.

[9] The Board's assertion that it cannot know if it is unlawfully discriminating or not because of the complexities of the law—and that, therefore, the condition lacks suitable definition—proves too much. Of course, many conditions may lead to disputes about law or fact, but that does not make the condition *itself* indefinite. In this case, it is hard to imagine a simpler condition than "don't engage in unlawful discrimination"; morever, however difficult that

The Board's own discussion also defeats its assertion relative to the second limitation. The Board and the applicable federal law recognize and support the power of Congress to fix terms and conditions to the receipt of federal funds. The Board does not dispute that Congress has a valid interest in regulating educational programs for which it provides funds. Congress by virtue of the passage of Title VI expressed its interest in prohibiting the use of federal funds to support discrimination. Quite clearly, it could rationally decide that the whole institution should be covered, since the whole institution benefits.[10] Cf. *Grove City College* v. *Bell*, 465 U.S. 555, 572 (1984) ("Most federal financial assistance has economic ripple effects throughout the aided institution, and it would be difficult, if not impossible, to determine which programs or activities receive such indirect benefits."). It is hard to imagine a condition more germane to federal purposes than that federal monies given to a State not be spent to further racial discrimination in any way.

The Board's characterization of a "consensus" prior to the Restoration Act concerning program specificity,[11] and its discussion of prior federal case law and more specifically Supreme Court decisions with respect to the program specificity requirements of Title VI, are clearly irrelevant. The stated purpose of the passage of the Restoration Act is to *supersede* prior Supreme Court precedent—*i.e.*, *Grove City College* v. *Bell*, 465 U.S. 555 (1984). With the passage of the Restoration Act, the intervening *Grove City* standard has been legislatively superseded and broad application of Title VI as pre-

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determination would be elsewhere, it is conceded and indisputable here.

[10] By the Board's logic, requiring the entire program not discriminate would not be germane either, if only a *part* of the program received the money.

[11] See Section V of the Restoration Act.

viously administered has been restored.[12] The question is no longer whether or not individual departments or components of educational institutions or higher education systems engaging in prohibited discriminatory conduct receive federal funds, but is now simply whether or not the educational system by itself or through any of its organizational components receives any federal financial assistance. If so, then the discrimination is unlawful.

In civil litigation, "the usual rule [for intervening changes in law] is that federal cases should be decided in accordance with the law existing at the time of the decision," *Goodman* v. *Lukens Steel Co.*, 107 S.Ct. 2617, 2621 (1987); *St. Francis College* v. *Al-Khazaraji*, 107 S.Ct. 2022 (1987). The Restoration Act does not specify an effective date which precludes application of this amendment to pending cases, and the usual admonition to generously construe civil rights statutes strongly militates in favor of adhering to the normal rule to apply the law as it exists at the time of the decision in this action.[13]

4. *Title VI Standing.* Title VI grants the United States authority to bring this action. Title VI of the Civil Rights Act of 1964 provides:

> no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be sub-

---

[12] The Board's assertion that *Grove City* had constitutional as well as statutory underpinnings is untenable, and the Board points to nothing in that opinion to support this view.

[13] This need not mean that expenditures which had already been made permissibly under *Grove* City, but which would have been impermissible under the Restoration Act, are made retroactively unlawful; but it does mean that the State's ongoing failure to dismantle its dual system—which is in this case a continuing violation—will clearly be evaluated more strictly for violations stemming from funds expended after the Restoration Act.

> jected to discrimination under any program or activity receiving Federal financial assistance . . . .
>
> Compliance with any requirement . . . may be effected (1) by the termination of or refusal to grant or to continue assistance . . . or (2) by *any other means authorized by law.* [Emphasis added.]

42 U.S.C. 2000d.

Historically, the State of Louisiana established and maintained a racially dual system of public higher education. The defendants, as recipients of substantial federal financial assistance and in consideration for that assistance, agreed to comply with Title VI and other applicable federal law. In January 1969, the U.S. Department of Health, Education and Welfare (hereinafter HEW) determined that the defendants were not in compliance with Title VI insofar as they operated a racially dual system of public higher education. As required by Title VI, the regulations issued thereunder, and the United States District Court's orders in *Adams* v. *Richardson*, 356 F. Supp. 92 (D.D.C. 1973), *aff'd* 480 F.2d 1159 (D.C. Cir. 1973), HEW sought between 1969 and 1973 to obtain from the defendants a constitutionally acceptable desegregation plan for the statewide system of public higher education. The defendants refused to submit the requested required plan and, in January 1974, HEW referred the matter to the Attorney General with a recommendation that this action be initiated. Consequently, on March 14, 1974, the Attorney General sued the defendants, seeking to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States [14] and Title VI of the Civil Rights Act of 1964, 42 U.S.C. ¶ 2000d *et seq.*

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[14] The United States no longer asserts Fourteenth Amendment claims in this litigation.

The United States contends that the continued maintenance of the State of Lousiana's racially dual system of public higher education is a continuing violation of the State's former *de jure* higher education system. Title VI echoes Congress's national policy and preference for the elimination of racial discrimination in federally financed programs. Moreover, the language contained in Title VI and quoted above—"by any other means authorized by law"—gives the Attorney General authorization to bring lawsuits, at the request of departments, to seek enforcement of the statute's provisions and to require, where appropriate, specific performance of contracts signed pursuant to Title VI.

Through the debates, Congress made it clear that Title VI imposed upon the states an obligation to insure that their agencies and branches complied with Title VI and to bring them into compliance with Title VI. 110 Cong. Rec. 8980, 13, 12, (1964) (Statements of Senator Humphrey and Javits). Congress's sentiments as reflected in the congressional debates made it equally clear that one of the purposes of Title VI was to eliminate the effects of racial discrimination in higher education; indeed, Senator Humphrey's statements emphatically emphasized that Title VI provisions were aimed at higher education. 110 Cong. Rec. 6541 (1964) ("The situation in higher education is also appalling.").

Since the State of Louisiana failed to eliminate the vestiges of its former *de jure* system, and agreed to comply with Title VI, the United States has standing to bring this action under at least two distinct theories: (1) breach of contract (here, the State agreed to comply with Title VI), and (2) statutory enforcement—*i.e.*, stemming from the failure to eliminate discrimination in federally financed programs.[15] The United States also

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[15] Defendants' purportedly good faith efforts to implement the Consent Decree does not deprive the United States of its right to

has standing in light of the commitments made to it by the Board in the Consent Decree. As discussed and demonstrated in the United States' Motion for Summary Judgment and accompanying pleadings, the defendants have failed to fully implement the Consent Decree provisions. Moreover, the State's Memorandum in Support of the Board's Motion for Summary Judgment clearly states that the Consent Decree has not been fully implemented. The Consent Decree, Part III, Effect of Decree paragraph A states specifically that "This Decree resolves all issues . . . relating to compliance with and enforcement of the Fourteenth Amendment and Title VI." At the very least, then, the United States also has standing to seek enforcement of Title VI through enforcement of the Consent Decree.

In sum, it defies belief that the federal government should lack standing to enforce a federal law prohibiting the expenditure of *its own* money in a discriminatory manner, especially when that law provides that "compliance . . . may be effected . . . by any . . . means authorized by law."

CONCLUSION

For the reasons set out above and in the United States' Response to the Board of Regents' Statement of Material Facts, the United States' Motion for Summary Judgment, the United States' Memorandum in Support of Motion for Summary Judgment, the United States' List of Material Facts, and in the interest of justice, the United States prays this Court to enter an order denying the Board of Regents' Motion for Summary Judgment.

---

seek enforcement of Title VI. As stated by Senator Humphrey during the congressional debates concerning Title VI, for example, "token integration" is not enough. 110 Cong. Rec. 6543 (1964).

Respectfully submitted,

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United States Attorney

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ROGER B. CLEGG
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/s/ Franz R. Marshall
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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing United States' Motion in Opposition to the Board of Regents' Motion for Summary Judgment, Memorandum in Support of the United States Opposition to the Board of Regents' Motion for Summary Judgment and United States' Response to the Board of Regents' Statement of Material Facts upon the following counsel by depositing same in DHL Courier Service, prepaid, addressed as follows:

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This the 6th day of June, 1988.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

UNIED STATES' RESPONSE TO THE BOARD OF REGENTS' STATEMENT OF MATERIAL UNDISPUTED FACTS

1. The United States denies this fact. See United States' List of Material Facts Nos. 43, 45, 49 attached to the United States' Motion for Summary Judgment filed on May 13, 1988. The United States submits that there are eleven institutions of public higher education; two of the eleven institutions operate multiple campuses.

2. Admitted.

3. Admitted.

4. Admitted.

5(g)-(q). The dates of establishment of the institutions are admitted. However, with the exception of 5(f) the race of the students to be admitted to the respective institutions has been omitted. Therefore, the United States refers the Court to the List of Material Facts No. 13 attached to the United States' Motion for Summary Judgment.

6. The United States is without readily obtainable information to admit or deny this Fact.

7. Admitted.

8. Admitted.

9(a)-(c) & (e). Admitted.

9(d). To the extent that this Fact purports that the formula provides an equitable distribution of funds among the PWIs and PBIs; it is denied. See Response to No. 18 *infra*.

10. Admitted.

11. Admtted.

12. Admitted.

13. Admitted.

14. The United States is without sufficient readily obtainable information in to admit or deny this Fact.

15. This Fact is admitted except as to classification of SUNO, SUSBO and SU-BR as institutions; the United States submits that they are campuses of the Southern University System.

16. The United States admits that since the effective date of Title VI the State has had an open admissions policy. However, the United States submits that certain institutions were identified in official state publications by the race of their respective student enrollments until 1968. See List of Material Facts No. 29 attached to the United States' Motion for Summary Judgment.

17. Admitted.

18. Admitted except as to the equitable distribution of funds. See the List of Material Facts Nos. 132, 133, 135-142, 145-151 attached to the United States' Motion for Summary Judgment.

19. Admitted except as to the examples provided. See List of Material Facts Nos. provided with respect to prior Fact response above.

20. Admitted.

21. Admitted.

22. The United States admits this Fact to the extent that it is understood and accepted that the calculation of state dollars includes dollars received by the PBIs under the Consent Decree and that the appropriate attachment to Beard Affidavit is Attachment Q.

23. Admitted.

24. Admitted.

25. Admitted.

26. Admitted.

27. Admitted.

28. The United States is without readily obtainable information to admit or deny the calculations contained in this Fact and the supporting Exhibit 3. Further, the United States submits that this Fact is irrelevant to the issue before the Court and this litigation.

29. Admitted.

30. Admitted.

31(a)-(c)(i), (d)-(g). Admitted.

31(c)(ii). This Fact is admitted to the extent that the defendants admit that the letters included in Attachment C resulted from inquiries by the plaintiff relative to complaints previously provided by the PBIs.

31(h)(i)(1). The United States admits the number of programs approved for implementation at the predominantly black institutions under the Consent Decree and the number of programs not implemented, but prescribed by the Consent Decree. Regarding the submission of the Ph. D. in Accountancy, however, the United States was informed by the lead faculty person for this Consent De-

cree program at Southern University that the program proposal was submitted to the Board of Regents for review and approval in December of 1986, accompanied by a request for a change in the name of the program. The United States denies, therefore, the Fact that the program proposal for the Ph. D. in Accountancy has not been submitted yet for Board of Regents' approval. *See* Attachment A.

31(h)(i)(2). The United States admits that pursuant to Part II., Section Seven (G)(2) of the 1981 Consent Decree the State of Louisiana was required to ensure that Southern University and Grambling State University received appropriations reasonably necessary to fund the requirements of the Consent Decree. Subsection (b) of Section Seven (G)(2) of the 1981 Consent Decree required, moreover, that if the State, following review of the State Appropriation Formula, determined that the projected allocation pursuant to the Formula would not be sufficient to fund the operating needs of Southern University and Grambling State University or to otherwise fund the requirements of this Consent Decree, that the State appropriate funds outside the Formula so as to ensure sufficient funding of these institutions.

The United States admits the Fact that funding outside-the-State formula funding mechanism was recommended for support of Consent Decree programs, but does not admit that funding levels sufficient to satisfy the requirements of the Consent Decree, which provisions are referenced above, were in fact recommended or provided by the State for support of Consent Decree programs.

31(h)(i)(3). The United States admits that the Board of Regents recommended funding outside-the-State formula funding mechanism for Consent Decree programs and that the Regents' recommendations were often lower, and sometimes substantially lower, than the re-

quest of the Governing Boards for predominantly black institutions. The United States is without information to respond to this Fact as it pertains to the "most common disagreements" between the Regents and the predominantly black institutions, but see List of Material Facts Nos. 129, 130 and affidavits of Dr. Clifton Conrad and President Joseph B. Johnson attached to the United States' Motion for Summary Judgment.

31(h)(i)(4). Admitted.

31(h)(i)(5). Admitted.

31(h)(i)(6). Admitted.

31(h)(ii). The United States denies that a total of $34,213,375 has been appropriated and received by the predominantly black institutions. Rather, the United States contends that Attachment K to Beard Affidavit shows that the total funding actually received (cash or Bonds sold) as of November 16, 1987 for the predominantly black institutions is $30,713,375. Moreover, the Board of Regents, Summary of Consent Decree Capital Outlay Funding through September 15, 1987 shows a total of $30,583,875 was received by the predominantly black institutions.

31(h)(iii). The United States is without readily obtainable information, other than that provided herein, to admit or deny this Fact.

31(h)(iv). The United States is without readily obtainable information, other than that provided herein, to admit or deny this Fact.

31(h)(v)(1). The United States is without readily obtainable information to admit or deny the recommendations of the Board of Regents regarding parity funding between the Southern Law School and LSU's Paul M. Hebert Law Center prior to the Consent Decree. The remainder of this Fact is admitted.

31(h)(v)(2). Admitted.

31(h)(v)(3). Admitted.

31(h)(vi). Admitted.

31(i)(i). Admitted.

31(i)(ii). Admitted.

31(i)(iii). The United States is without readily obtainable information, other than that provided herein, to admit or deny what all states have in terms of their higher educational systems or what all states can afford in terms of higher education institutions. Furthermore, the United States submits that the information contained herein is irrelevant to the issue before the Court and to this litigation. The United States denies that the missions of Louisiana's universities "appropriately" recognize different purposes, programs, and emphases for each institution.

31(i)(iv). Admitted.

31(i)(v). The United States admits that the Southern Regional Education Board (SREB) employs a classification system for institutions of higher learning based upon a scheme like that described in 31(i)(iv). Additionally, it is also admitted that the SREB system contains eight categories of institutions and that this Fact correctly defines each category of institution. The United States denies this Fact to the extent that it states that the SREB model is an "appropriate" classification with which to illustrate the distinctions among Louisiana's institutions of higher learning, but admits that it is a classification system, among others, used in higher education.

31(j)(i). The United States is without readily obtainable information to admit or deny this Fact, although we have requested information from the Board of Regents through interrogatories propounded on April

21, 1988, regarding the number of requests to offer new academic programs since 1980 that the Board denied and its reasons for denying each request. This information has not been provided to us as yet by the Regents, but counsel has agreed to supplement the Board's response in order to provide this information to us in the near future.

31(j)(ii) and (iii). The United States is without readily obtainable information to admit or deny the number of academic program reviews conducted by the Board of Regents during the Consent Decree period. The United States has recently obtained information regarding the number of programs discontinued at each institution of higher learning, including the predominantly black institutions, from the Board of Regents in response to interrogatories propounded by the United States. We have not had an opportunity to analyze this information and, consequently, are not in a position to admit or deny these Facts to the extent they reference the number of programs terminated since 1982 at predominantly black institutions.

31(j)(iv). The United States admits that the Board of Regents in its review of existing academic programs has considered whether elimination might disproportionately affect predominantly black institutions. Regarding the Board of Regents' actions in reference to Southern University's undergraduate Engineering and Architecture programs, the Board of Regents on December 18, 1986, accepted the recommendation of its Academic Affairs Committee and voted not to terminate both Southern's Engineering and Architecture programs because to terminate both might violate the requirements of the Consent Decree. The Regents on that same date did vote to terminate the Architecture program at Southern. On March 26, 1987, after an extended appeals process and an address by then Governor Edwin Edwards to the Board of Regents recommending, among other things,

that Southern's Architecture program not be terminated, the Board voted to reverse its decision of December 18, 1986, terminating Southern's Architecture program. The Board, moreover, voted to direct the Board staff to schedule this program for review again during the 1989-90 academic year.

32(a), (c)-(j). Admitted.

32(b). The United States admits that the program was undertaken; however, the implementation of said program was not wholly satisfactory. See Response to Fact 31(c)(ii).

33. Admitted.

34. Admitted.

35. The United States is without readily obtainable information, other than that provided herein, to admit or deny the extent of the alleged declining revenues, the reasons therefore and/or the size of any alleged deficit. Further, the United States submits that the information contained in Fact 35 is irrelevant to the issue before this Court.

36. See Response to No. 35 above.

37. See Response to No. 35.

38. See Response to No. 35.

39. Admitted.

40. The United States is without readily obtainable information, other than that provided herein, to admit or deny this Fact. Further, the United States submits that House Bill 626 is the best evidence.

41. Admitted.

42. Admitted.

43. Admitted.

44. The United States is without readily obtainable information, other than that provided herein, to admit

or deny Fall 1987 overall student enrollment figures for Southern University-Baton Rouge and Southern University-New Orleans Consent Decree initiated academic programs. The United States has recently requested Fall 1987 overall student enrollment figures, as well as the number of majors in each Consent Decree program, from Southern University-Shreveport and Grambling State University. When analysis of this information is complete, the United States will be in a position to respond by admitting or denying this aspect of this Fact.

Included as Attachment B and C to this Response is student enrollment data by Consent Decree program for the 1986-87 academic year, which was submitted to the United States by Southern University-Baton Rouge and Southern University-New Orleans in August of 1987. This information reflects total headcount student enrollment, part-time and full-time, by race for the 1986-87 academic year. Where information was made available regarding the number of actual majors in each program, we have provided this information also.

45. The United States is without readily obtainable information, other than that provided herein, to admit or deny this Fact.

46. See Response to Fact No. 45. Further, the information herein is irrelevant to the extent the State of Louisiana actually operates an open admissions policy with respect to admission to its institutions of higher education.

47. See Response to No. 46.

48. Admitted. Further see Response to No. 46.

49. See Response to No. 48.

50. See Response to No. 48.

51. The United States admits that this is an accurate excerpt from the cited deposition. However, the United

States denies the implied or expressed validity of the statements therein. Further, the United States submits that the information provided therein is irrelevant to the issue before the Court and to this litigation.

52. See Response to No. 51.

53. See Response to No. 45. Further, the United States submits that the information provided therein is irrelevant to the issue before the Court.

54. See Response No. 53. Further, the information provided therein is irrelevant to this litigation except when used to choose between constitutionally acceptable desegregation plans.

55. See Response to No. 54.

56. See Response to No. 54.

57. See Response to No. 51.

58. See Response to No. 51.

59. See Response to No. 51.

60. See Response to No. 51.

61. See Response to No. 51.

62. See Response to No. 51.

63. See Response to No. 51.

64. See Response to No. 51.

65. See Response to No. 51.

66. See Response to No. 51.

67. See Response to No. 51.

68. The United States admits that this is an accurate excerpt from the described Report. However, the United States denies any implied or expressed validity of the statements contained therein. Further, the United States submits that the information provided therein is irrelevant to the issue before the Court and to this litigation.

69. See Response to No. 68.

70. See Response to No. 68.

71. See Response to No. 68.

72. See Response to No. 68.

73. See Response to No. 68.

74. Admitted. Further, the United States submits that information provided herein is irrelevant to the issue before the Court.

75. See Response to No. 74.

76. See Response to No. 74.

78. The United States is without readily obtainable information, other than that provided herein, to admit or deny this Fact. Further, the United States submits that the information contained herein is irrelevant to the issue before the Court and to this litigation.

79. See Response to No. 78.

Respectfully submitted,

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Assistant Attorney General

/s/ Nathaniel Douglas
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

MOTION FOR HEARING

[Filed Dec. 31, 1987]

Pursuant to Part V of the 1981 Consent Decree [1] the Southern University Board of Supervisors, a defendant, requests this Court to enter an order maintaining jurisdiction over this litigation, scheduling a hearing in the instant litigation for the purpose of determining whether defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis, preserving all privileges, obligations and rights of the parties hereto.

Part V of the 1981 Consent Decree states in pertinent part:

> B. If any party, prior to December 31, 1987, has commenced proceedings either to seek compliance with this Decree, or to seek other relief necessarily implicating this Decree, this Court shall retain jurisdiction over this action until all issues relating to such proceedings have been resolved.

---

[1] Reference here and hereafter to "Consent Decree refers to the 1982 Addendum to Consent Decree as well as the 1981 Consent Decree.

C. On December 31, 1987, this Decree shall terminate automatically and without further formality unless the plaintiff by motion requests this court to conduct a hearing for the purpose of determining whether defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis.

The Memorandum in Support of this Motion attached hereto is incorporated herein by reference.

WHEREFORE, the Southern University Board of Supervisors pray that this Court enter an order maintaining jurisdiction over this litigation, and in due course scheduling a hearing for the purpose set forth above and preserving all privileges, obligations and rights of the parties.

Respectfully Submitted,

/s/ William J. Jefferson
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record properly addressed by depositing same in the United States mail with sufficient postage prepaid on this 31st day of Dec., 1987.

/s/ William J. Jefferson
Attorney of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

MEMORANDUM IN SUPPORT OF MOTION FOR HEARING

Pursuant to Part V of the 1981 Consent Decree,[2] the Southern University Board of Supervisors, Defendant, requests this Court to maintain jurisdiction over this action, scheduling a hearing in due course for the purpose of determining whether defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis and preserving all privileges, obligations and rights of the parties hereto.

As grounds for the Motion, the United States avers as follows:

1. Part V of the 1981 Consent Decree states in pertinet part:

> B. If any party, prior to December 31, 1987, has commenced proceedings either to seek compliance with this Decree, or to seek other relief necessarily implicating this Decree, this Court shall retain jurisdiction over this action until all issues relating to such proceedings have been resolved.

---

[2] Reference here and hereafter to "Consent Decree" refers to the 1982 Addendum to Consent Decree as well as the 1981 Consent Decree.

C. On December 31, 1987, this Decree shall terminate automatically and without further formality unless the plaintiff by motion requests this Court to conduct a hearing for the purpose of determining whether defendants have fully implemented all provisions of this Decree and are operating the system of public higher education on a unitary basis.

2. Although cast as a defendant, the Southern University Board of Supervisors interests are more closely aligned with those of the plaintiff, the United States, in this matter and Southern University was to have been a major beneficiary of enhancement in academic programs and physical facilities.

3. Throughout the life of the 1981 Consent Decree the parties have monitored compliance with the Decree, have regularly complained of the failure of the State and other defendants to comply with the terms of the Consent Decree, and efforts have been made to resolve problems and/or concerns through negotiation.

4. It is the evaluation of, *inter alia*, the defendant that all of the requirements of the Decree have not been fully and completely met. The Consent Decree committed the State and other defendants to enhance predominantly black institutions, and in particular to enhance the institutions of the Southern University System through: (a) strengthening existing academic programs; (b) placing new high demand, high cost programs at Southern; (c) improving its existing capital facilities and constructing new capital facilities, and (d) by increasing financial support to these institutions, among other commitments. In spite of the clear mandates of the decree, its commitment to enhance predominantly black institutions has not been fulfilled, the equal opportunity provisions of the decree have not been met, and the decree has not been otherwise implemented in good faith for these, among other reasons:

i. The defendants have failed to locate all of the new academic programs required by the "Consent Decree" at the various institutions of the Southern University System;

ii. The defendants have not implemented new academic programs in a timely manner, nor in accordance with established State policies and other established policies regarding educational quality;

iii. The defendants have failed to fund the new programs at a level to make them viable and capable of attracting students of all races to Southern University;

iv. The defendants have failed to provide increased financial support as is reasonably necessary to fund the requirements of the "Consent Decree", and to provide inflationary increases as required;

v. The defendants have conducted academic program reviews and recommended program elimination inconsistent with the objective of enhancing predominantly black institutions;

vi. The defendants have not improved Southern's physical plant such that it is comparable to those plants of comparable predominantly white institutions and more than half of the "Consent Decree" capital projects have not been started or completed;

vii. The defendants have failed to meet the racial composition goals for certain of its governing boards;

viii. Equal access goals of the decree are not fulfilled and Southern has been unable to successfully recruit other race students because of the failure of the State to provide other race scholarships, public relations funds to attract other race students, provide access to other race high school students, and other requirements;

ix. The defendants have failed to provide appropriate funding for developmental education programs and student financial assistance programs as required by the decree; and

x. equal employment goals have not been met at Southern because of the defendants' failure to appropriate funds sufficient to attract other race faculty and staff to Southern and to provide an appropriate academic environment.

5. The plaintiff has communicated to the defendants a description of the unfulfilled requirements.

6. The plaintiff has transmitted a proposal to resolve the remaining issues to the defendants.

7. The plaintiff and defendants have initiated negotiations concerning the plaintiff's proposal and to resolve outstanding issues.

WHEREFORE, the Southern University Board of Supervisors requests that this Court, for the reasons set out above and in the interest of justice enter an order maintaining jurisdiction over this action, and providing for the conduct of a hearing as required by Part V, B and C of the Consent Decree, and preserving all privileges, obligations and rights of the parties.

Respectfully Submitted,

/s/ William J. Jefferson
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

ORDER

The Southern University Board of Supervisors, Defendant, having requested that this Court enter an order maintaining jurisdiction over this litigation and enter an order to conduct a hearing for the purpose of determining whether defendants have fully implemented all provisions of the 1981 Consent Decree and the 1982 Addendum to Consent Decree and are operating the system of public higher education on a unitary basis, and to assign a date for such hearing in due course, the same is, for good cause shown, GRANTED.

THEREFORE, jurisdiction over this litigation is maintained, a hearing date will be set in due course to determine a date for the conduct of a hearing for the purpose of determining whether defendants have fully implemented all provisions of the 1981 Consent Decree and the 1982 Addendum to Consent Decree and are operating the system of public higher education on a unitary basis, such hearing date to be set in this matter pursuant to further orders of the court, and all privileges, obligations, and rights of the parties are hereby preserved.

New Orleans, Louisiana, December —, 1987.

United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing United States' Motion for Hearing and Memorandum in Support of Motion for Hearing upon the following counsel by transmitting a copy by first class mail, postage prepaid, addressed as follows:

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This the 31st day of December, 1987.

Respectfully Submitted,

/s/ William J. Jefferson
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF LOUISIANA, *et al.*,
Defendants.

MOTION FOR EVIDENTIARY HEARING

[Filed Oct. 19, 1988]

COMES NOW DEFENDANT, Southern University Board of Supervisors, and respectfully requests this court to enter an order scheduling a hearing for the purpose of determining fully whether defendants have fully implemented all provisions of the 1981 Consent Decree as requested by the United States of America and by the Southern University Board of Supervisors in their motions of December 29 and December 31, 1987.

The Memorandum in support of this motion attached hereto is incorporated herein by reference.

WHEREFORE, the Defendant Southern University Board of Supervisors prays that this court enter an order scheduling a hearing for the purpose of setting a hearing date to determine compliance with the 1981 Consent Decree.

Respectfully Submitted,

/s/ William J. Jefferson
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NOTICE

CONSIDERING THE FOREGOING motion and attached memorandum, IT IS ORDERED that an evidentiary hearing be held at the U.S. District Courthouse, 500 Camp Street, Section "A", on the 9th day of November, 1988, at 10:00 a.m. for the purpose of determining whether defendants have fully implemented all provisions of the 1981 Consent Decree.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record properly addressed by depositing same in the United States mail with sufficient postage prepaid on this 19th day of Oct., 1988.

/s/ William J. Jefferson
Attorney of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STATE OF LOUISIANA, *et al.*,
Defendants.

MEMORANDUM IN SUPPORT OF A MOTION
FOR AN EVIDENTIARY HEARING

The Consent Decree of 1981 was a proposed remedy to desegregate the Louisiana System of Higher Education. However, in entering into the Consent Decree, no defendant admitted and the court made no determination that there was then existing a violation of the Constitution of the United States, Title VI, or any other governing provision. These determinations, generally termed "liabiilty issues", were decided by this court in its August 2, 1988 ruling. In fact, the "liability issues" were determined by summary judgment motions.

Since the Consent Decree dealt with the "remedy" aspect of this cause, it would appear obviously unconnected to the liability determinations. That a dual system still existed after the ordering of a remedy, does not necessarily shed light on whether the remedy was effective or appropriate. No medicine helps the patient if it is not properly taken, or if it is not taken as required. To find that the patient is still ill following the prescribing of the

perfect but unapplied cure proves nothing about the inherent effectiveness of the cure. But more than this, it is unnecessary to a diagnosis that the patient is ill to inquire about his medicine. Liability and remedy are separate issues and require different proof for evaluation and resolution.

In finding a dual system of higher education existing in the state, the court condemned the Consent Decree. Unfortunately, the Consent Decree was convicted without a trial or a hearing. A determination of the ineffectiveness of the Consent Decree was unnecessary to the finding of liability, but worse, it is not supported by any creditable evidence of record.

The court has badly asserted in its August 2 ruling: that ". . . contrary to the court's earlier expectations, the consent decree as implemented has proved no viable solution. If anything, the consent decree has exacerbated the segregation." at Page 33. Further, the court stated:

> "While, primarily because of the state's recent economic downturn, the state did not spend all the money called for by the consent decree, the state did spend over $200 million towards the consent decree. It is now apparent that the failure was not in spending too little, but rather was in the entire structure of the consent decree." at Page 33.

These conclusory statements suffer from a fatal lack of proof. Were an evidentiary hearing to be held on the implementation of the consent decree, it would be clearly established that the consent decree was never implemented and, absent this predicate, cannot be judged. At such a hearing, defendant Southern University Board of Supervisors would establish that in spite of the consent decree's requirement that Southern's existing academic programs be strengthened that it was cut over $12,000,000 in such programs over the six year term of the consent decree; in spite of its requirement that new academic

programs be funded adequately, less than half of the money needed for such programs was provided and many programs were started late in the life of the consent decree; and in spite of the state's agreement to fund $79 million in capital outlay projcts for the Southern University system's institutions, only $14 million or 18% was funded. This destructive combination of deep cuts, inadequate funding for new programs, and neglected physical plant needs, eroded rather than enhanced the Southern University institutions.

The court generously attributes the state's failure to adequately fund the consent decree's requirements to the state's recent economic downturn. However, during the six year term of the consent decree, the state spent $5,237,539.997.00 on new capital outlay projects, thus making a conscious decision to choose to spend on these projects over consent decree projects. The statement that over $200 million was spent toward the consent decree is also grossly incorrect. An evidentiary hearing on the consent decre would establish that Grambling received around $20,000 over six years in academic programs and $16 million in capital outlay programs, and Southern $45 million in academic programs over six years and $14 million in capital outlay. Considering both capital outlay and academic program funding, the historically black universities received around $95 million.

The court's conclusion that the consent decree "exacerbated the segregation" implies that the consent decree had enhanced the historically black schools to the extent that black students were finding them so attractive as to eschew enrolling in historically white schools in favor of them. An evidentiary hearing will establish the true reason for this phenomenon. An evidentiary hearing would establish that the discriminatory experiences of blacks on many historically white university campuses, documented nationwide, a drop off in blacks attending college in our state as compared to whites better explain

these unfortunate results. In any event, it would make it clear that whatever the cause of apparently increased racial polarization might be, the implementation of the consent decree is not one of them.

The demand for an evidentiary hearing involves more than a search for the truth. It also is a necessary predicate to imposing an appropirate remedy and one more intrusive than the consent decree. See *Milliken v. Bradley*, 438 U.S. 267, 97 S. Ct. 2749, 53 L. Ed 745 (1977), *Austin Independent School District v. United States*, 429 U.S. 990, 97 S.St. 517, 50 L.Ed. 2d 603 (1976); and *Geier v. Dunn*, 337 F. Supp. 573, 581 (M.D. Tenn. 1972).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing United States' Motion for Hearing and Memorandum in Support of Motion for Hearing upon the following counsel by transmitting a copy by first class mail, postage prepaid, addressed as follows:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

ORDER & REASONS

[Filed Nov. 18, 1988]

The motion of Southern University Board of Supervisors for an evidentiary hearing was taken under submission without oral argument on the basis of the briefs filed by the parties. The motion is DENIED for the following reasons.

In essence, the motion appears to be an attempt on the part of mover for a rehearing of the matters previously decided by the Court in its Order and Reasons dated August 2, 1988. As the United States' opposition to the motion for a hearing aptly demonstrates, the Court has heretofore found that the State has not implemented *all* provisions of the 1981 decree. Further, as the United States Government's memorandum also points out, many of the matters sought to be made the subject of evidentiary hearing can be obtained and submitted to the Court in the form of requests for admissions or on stipulated facts. All of the other matters addressed in the motion, to the extent relevant to the litigation, can be heard when the Court considers the scope of a final remedial plan.

New Orleans, Louisiana, this 17 day of November, 1988.

/s/ John Minor Wisdom
JUDGE JOHN M. WISDOM

/s/ Charles Schwartz, Jr.
JUDGE CHARLES SCHWARTZ, JR.

/s/ Veronica D. Wicker
JUDGE VERONICA D. WICKER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

OPINION AND ORDER

[Filed Nov. 22. 1988]

This cause was the subject of a status hearing this date which had been fixed for the purpose of determining if the parties could arrive at a consensus plan which would comply with the Court's order of August 2, 1988 and either obviate or expedite the hearing on remedy which will be tried beginning February 15, 1989.

Without, in any manner, determining the appropriate remedy, the Court makes the following observations.

1. As indicated by our order entered herein on November 18 denying the motion of the Southern Board of Supervisors for an evidentiary hearing (to determine fully whether defendants have fully implemented all provisions of the 1981 decree) Southern University's approach seems to be misguided. The Court paraphrases what was implicit in its Auust 2nd opinion: because of the undisputed and utter failure of the 1981 consent decree to eradicate the dual system (as is evidenced by the annual reports submitted to the Court under the decree), a plan that

would essentially mimic the 1981 consent decree—that would basically require the State simply to spend extra money on the four black schools—could show little, if any, likelihood of success in eradicating the illegal, dual racial identifiability and nature of Louisiana's public universities with all deliberate speed required under *Brown II*.

2. The obligations of the State to continue to comply with the remedies in the consent decree has expired, and are no longer in effect. The State of Louisiana has no present obligations with respect to it. "(A)ny available remedies [under the consent decree] necessarily precluded enforcement of the specific monetary obligations under the decree since these obligations ended in 1987 under the decree." Op. Aug. 2, 1988, p. 13. It thus seems wholly unrealistic for any party to rely upon it as a viable remedy.

3. No consensus plan has been proposed.

4. Several plans suggest or have no opposition to vesting the State's supervision over the institutions to a single board as previously suggested by the Court in its August 2, 1988 opinion, Op. p. 344. If some guidance from the Court would be helpful to the parties, we suggest that this would be a good beginning and focal point to fashion a remedy. Moreover, based on the Court's review of the record and its knowledge gained over the years of its experience with this case, it concludes that such a requirement is likely to be a part of any remedy that will be adopted or imposed.

ORDER

Since there is a lack of consensus among the parties, it is apparent that the Court will be required to proceed with its hearing on February 15, 1989 to determine what final remedial plan shall be implemented including whether any or all portions of the proposed plans should be considered. Accordingly, shortly hereafter, the Court will

appoint a Special Master pursuant to Federal Rule of Civil Procedure 53 for the purpose of assisting the Court in ordering a final remedial plan and judgment. *See Gary W. v. State of Louisiana*, 601 F.2d 240 (5th Cir. 1979). His report and recommendations shall be considered during the proceedings beginning February 15, 1989 to determine what remedial plan should be ordered.

By entering this order the Court does not mean to preclude continuing settlement discussions among the parties. Thus, the parties are welcome to submit to the Court and the Special Master for their review and approval a consensus plan which the parties believe complies with the Constitution and this Court's August 2, 1988 Order. However, any such consensus plan shall be submitted on or before February 15, 1989.

New Orleans, Louisiana, this 22nd day of November, 1988.

/s/ John Minor Wisdom
JUDGE JOHN M. WISDOM

/s/ Charles Schwartz, Jr.
JUDGE CHARLES SCHWARTZ, JR.

/s/ Veronica D. Wicker
JUDGE VERONICA D. WICKER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

SOUTHERN UNIVERSITY BOARD OF SUPERVISORS' RESPONSE TO THE SPECIAL MASTERS' RECOMMENDED REMEDIAL PLAN

[Filed May 2, 1989]

Pursuant to the pertinent orders of the Special Master, the Southern University Board of Supervisors hereby submits its comments and recommendations for amendment to the "Special Master's Recommended Remedial Plan" (hereinafter sometimes "Remedial Plan"). This discussion tracks the format of the Special Master's "Final Recommendations" Section of the Remedial Plan, beginning on page 108, restating and amending it.

A. *Single Governing Board Comments*

1. Comments

The Special Master has stated at page 42 of the Remedial Plan that the critical inquiry on the single board question is whether its creation would increase integration of the public institutions—whether it would help to

eliminate their racial identifiability. We disagree. The questions really are two:

(i) Whether there is a preponderance of evidence on the record that the creation of a single governance board will increase integration of the state's colleges? and,

(ii) even assuming that the record establishes that a single goverance board will increase integration, whether its adoption, requiring the elimination of a state's constitutionally mandated governance scheme, is necessary in order to achieve an increase in integration in the state's colleges?

As Southern showed in its post trial memorandum, there is little evidence that a single governance board will increase integration. Except for Dr. McTarnaghan, each witness testifying on the single board question for the State, for the Board of Regents, and for LSU denies that he is an expert in higher education desegregation, in higher education governance, or both. Inasmuch as the testimony of each is offered as expert testimony on the subjects, the testimony is due very little, if any weight. Opposing Dr. McTarnaghan on the desegregation effect of single board governance are Dr. Conrad, Dr. Leslie, Dr. Richardson and Ms. Gade. Further, the history of the lack of success of single board states in the South, including the States of Georgia, Mississippi, and Florida, in achieving integration of higher education is undisputed on the record. Dr. McTarnaghan's self-declartior of a Florida success story on integration on his deposition is belied by his own testimony at trial that only five (5%) percent of the students in Florida's historically white 4-year colleges are black, only 3% of the graduates of Florida's historically white colleges are black, and that the lone historically black 4-year college in the system, Florida A&M University, annually grants better than half of all of the black baccalaureate degrees granted in Florida. He admitted, on cross-examination that Flor-

ida's was not a success story of higher education integration (McTarnaghan, Trail Testimony, pp. ——). His testimony also established that Florida failed several times between 1968 and 1978 to have HEW accept its plan of desegregation for its colleges. It was not until 1978 that Florida was able to produce a plan meeting the minmium requirements of the Revised Criteria, and not until December 1988, ten years later, that Florida was released by HEW (now the U.S. Department of Education) as having substantially complied with the dictates of its plan. Thus, far from a panacea in Florida, its single board took over 20 years to create a constitutionally acceptable plan, and then Florida had significantly more difficulty in achieving an acceptable plan than did certain multi-board states, notably the State of Arkansas. Reliance on Dr. McTarnaghan's testimony then as to the "success" of Florida under its single board is sorely misplaced. Further, that Dr. McTarnaghan did not bring to the attention of the Court and the parties the existence of a well documented study in Florida that chronicles salient difficulties of the State of Florida in educating its black population, raises important new questions about the credibility of Dr. McTarnaghan. (See Attachment)

Southern has demonstrated previously that a single board is not needed in order to increase other-race presence on governance boards and on the state's college campuses. Other, less intrusive alternatives are available. There is no geometric fit between the remedy of a single board and the violation of racially identifiable boards and institutions. Speculation that under a single board funds would be "freed up" . . . . "presumably to aid in the desegregation process" (page 43 of the Remedial Plan); that it is "sensible that efficient decisions might aid in desegregation;" and that while Florida's "success" in achieving desegregation under a single board is "predictive," "but not in any way implausible provides weak

support to dismantle a system of governance adopted in Louisiana only 14 years ago, subsequent to most of the segregative actions of the State of Louisiana. (See page 48 of the Remedial Plan).

The Special Master's conclusion that the "conditions under which the judgment [on the success of a single board] in Louisiana is offered" premised on the argument of the Governor and three of its four boards that a single board will achieve desegregation is erroneous and glosses over reality. Certainly, the Governor has always advocated a single board, but not because he viewed it as a desegregation vehicle. He only came to this view after the opportunity to have a single board ordered by the Court presented itself in the Court's August 2, 1988 ruling. The Board of Regents flatly resolved that a single governance board bore no correlation to the quality of the State's institutions and vigorously opposed the single board concept during the 1988 Regular Session of the Louisiana Legislature at which the Governor's single board proposition failed. The Board of Regents has never reversed itself from that earlier position. It has only allowed that if a single board were essential to achieve a settlement of this litigation, it would agree to its adoption. Representation by counsel to the Regents to this Court to the contrary as inaccurate and misrepresents the facts. The Board of Trustees, as has been shown, merely capitulated to the position of support of the single board concept after political pressure from the Governor's office. (See Attachments to S.U. Remedial Plan). And the LSU Board only agreed to the single board on the condition that it be included as a flagship university in the state's constitution. None of these board positions ever purported to have anything to do with desegregation until very recently in this judicial process. The coerced agreement of the boards to the single board concept indicates more the lack of commitment on the single board issue by these boards, rather than support for the plan.

For the foregoing, and for all the reasons heretofore urged in connection with the issue by Southern University, Southern strenuously objects to the adoption of a single governance board as a desegregation remedy by the Court and its recommendation by the Special Master.

2. *Restatement and Amendment*

Assuming arguendo the establishment of a single governance board, Southern proposes that it be done such that the Court limits as much as possible its intrusion into areas of educational policy and political decision-making. Southern proposes the following:

(1) The four boards currently governing public higher education in Louisiana should be disbanded and their powers consolidated into a single governing board. The new board should be given ultimate authority over academic, budgetary, personnel and administrative affairs of each of the public institutions currently overseen by the Board of Trustees, the Southern Board of Supervisors and the LSU Board of Supervisors. Additionally, the board should be given the special mission of monitoring and implementing the remedial order of the Court and of insuring that progress toward eliminating Louisiana's racially dual education system is achieved. The Legislature shall provide for the name of the new consolidated system of higher education.

(2) The board shall have the number of voting members as provided for by the legislature, which members shall be preferably appointed by the legislature, but in any event, in a manner established by the legislature. The members shall have such terms and such qualifications as may be provided by law, except that such members must at a minimum be firmly committed to the desegregation goals of the Court's order and should be selected to broadly represent the racial and ethnic diversity of the State. An initial board of 17 voting members should

be established immediately, made up of members of the existing boards appointed by the legislature, or should the legislature fail to do so by the Court from among nominees recommended by the existing boards. The LSU Board of Supervisors, the Southern Board of Supervisors, and the Board of Trustees shall have four members each appointed to the initial board, and the Board of Regents shall have five members appointed. The board shall have one student member appointed by the Court recommended by the Louisiana Council of Student Government Presidents. Persons appointed to the initial board may be reappointed under the provisions for appointment of a single governance board as provided by the legislature.

(3) To insure protection for the students attending historically black institutions, a minimum number of black board members should be mandated for an interim period, both for the initial board and for the board subsequently approved by the legislature. While the remedial provisions of the Court's order are being implemented, the mandated minimum of blacks on the board shall over represent the proportion of blacks in Louisiana's population as a whole. A requirement of seven voting black members for the first five years of the board would be appropriate providing the board is a 17 member board or a requirement of no less than the percentage of black representation on the board that the number seven bears to the number seventeen should the number of members on the board be changed by the legislature to a number greater than or less than seventeen. In addition, the board should appoint one student member recommended by the Louisiana Council of Student Body Presidents on an annual basis, who frequentyy should be black. Thereafter, until a constitutionally acceptable level of desegregation is achieved, the number of black members to the board should, at a minimum, should correspond to the proportion of blacks in the state's population. Inasmuch as 44.9% of the public school population in Louisiana

is black, and inasmuch as a connection is envisioned between enlarging opportunities for blacks in higher education through addressing the preparation of black students in the elementary and secondary school programs, it would not be inappropriate, and in fact would be useful to desegregation, for the presence of blacks on the board to exceed the presence of blacks in the population for a period exceeding the referenced five year transition period.

(5) Add at the end of this paragraph the following:

In the event the number of members of an Advisory Committee of a PBI is odd, the black membership may exceed 50% to provide for a black majority.

The procedure adopted for the use of Advisory Committees should insure that they may be both formed and disbanded by the institution involved.

B. *Classification of State Universities*

(3) Delete recommendation of no remedial education courses in doctroral universities, otherwise it would appear that students admitted under "exceptions" may be placed at unreasonably great risk.

Add the following:

Pursuant to one of the goals of granting Southern University and A&M College doctoral status—to increase black terminal degree holders—the governing board shall provide for Southern's doctoral offerings in the fields of science, technology, and math, where there is a severe sparsity of black Ph.D.'s.

The State shall appropriate funds for the start-up of new doctoral programs beginning with the 1989-90 fiscal year which may be carried over in subsequent years as needed for planning and implementation of the doctoral programs. At least $4 million should be allotted for this

purpose initially until more specific proposals can be developed for the new doctoral programs. With this allocation made available, the selected doctoral programs could be implemented without delay.

Southern University and Agricultural and Mechanical College should not have funding for developmental education diminished during the pendency of its adoption of selective admissions and its concomitant move to doctoral status.

C. *Selective Admissions Standards*

Comments

Southern objects to the use of selective admissions standards, but agrees that if such are to be adopted, the Special Master's recommendations are sensitive to the special concerns about minority access to higher education, particularly by placing primary emphasis on high school grades, class rank and breadth of course work undertaken. In the view of Southern, even these standards must be carefully phased-in and carefully monitored to assess their impact on black students. Formal biannual reviews of this impact should be required.

The Special Master's recommendation in C(4) that "the goal is that each campus should have a racial composition roughly approximating the racial composition of the college-going population of the state," sets forth a prescription for failure of the plan of desegregation. The goal, to be achievable and realistic, should be to significantly increase other-race presence on historically white and black campuses, and to improve the college-going rates and college graduation rates of blacks to the point of parity with whites.

The admission exceptions of 10% at SUBR for other-race students is too low, higher exceptions for other-race students may be needed to afford Southern the best opportunity for integration and to insure that the needs of black students are adequately met.

D. *Comprehensive Community College System*

1. Comments

The Florida experience with its community colleges bodes ill for Louisiana's adoption of them as a means to increase post-secondary educational opportunities for its black citizens. Southern strenuously objects to a full fledged community college system as not leading to integration of Louisiana's 4-year colleges and hence not leading to the production of more black baccalaureate degree holders. Moreover, the record is devoid of any evidence of the historical use of community colleges as a part of a desegregation plan. As Dr. Orfield and Dr. Blake have testified most persuasively, the reliance on these colleges as transfer vehicles to increase black college participation has proven a mistake. In some cases, the community college themselves may become integrated, but this case is about integrating the existing colleges and increasing opportunities therein for the historical victims of discrimination. The adoption of a community college system does not address this problem.

The make-up of any community college system established in this State should be left to the Legislature. Issues such as the name of the system and those raised in D(2) are strictly neutral educational policy decisions that a court should not make.

2. *Restatement and Amendment*

Assuming arguendo a community college system, Southern proposes the following:

(1) The two-year community colleges subject to the Court's order (LSU-E, LSU-A, SUSBO and Delgado) should be reorganized as part of a single comprehensive community college system for Louisiana. Bossier Parish Community College shall be incorporated into the system as shall St. Bernard Parish Community College. The

board shall insure that the offerings at Bossier Parish Community College do not adversely affect the opportunity for SUSBO to attract white. Further, the presence of two-year course offerings by Louisiana Tech and Northwestern in Shreveport, reduces the opportunity for SUSBO to increase its white enrollment. Therefore, all such two-year offerings by such four-year schools now offered in Shreveport shall be transferred by the governing board to SUSBO. Further, the admissions standards at LSU-Shreveport and SUSBO should be so differentiated so as to permit a better opportunity for SUSBO to attract white students.

(5) The remaining two year programs at SUNO should be transferred to Delgado. Should the governing board decide that Delgado's offerings do not meet the demand for community college education in New Orleans, then Delgado's two year role should be expanded. Southern University at New Orleans' four-year role should be enhanced as the only four-year open admissions public university in the City of New Orleans for which, given the racial and demographic characteristics of the city, there is a demonstrated need.

(6) The Board should also study the need for and feasibility of starting new community colleges in the areas of the State where none currently exist. Special attention should be given to Baton Rouge where a community college will be needed to service local students not able to be admitted at LSU A&M and Southern University A&M, once both have selective admissions. Additionally, no community college should be made operative in the Baton Rouge area until:

(a) The minimum capital outlay enhancement projects as provided for hereunder for Southern University A&M have been completed; and

(b) Programs in business, mass communication, nursing and public policy have been accredited and reaccred-

ited, during the five year period, and at least three new doctoral programs have admitted students. To do otherwise would place in jeopardy the opportunity for Southern University to attract white students since many may opt to attend the community college and then transfer to one of the predominantly white institutions.

E. *Program Transfer and Enrollment Management*

2. *Restatement and Amendment*

(1) Merging and/or downgrading or closing existing State universities is not recommended at this time. Instead, a system of enrollment management, program review and program transfer should be initiated to address the problem of program duplication and accompanying waste of resources and segregation. The Board should assign the president the mission of reviewing all current course offerings. The president should recommend appropriate enrollment levels for each academic program and also identify programs not meeting minimal quality standards with a view toward their elimination. Where the programs of historically black universities are so reviewed, the president shall ascertain through a careful and thorough study, whether such programs lack traditional quality standards because of reasons based in historic racial discrimination and/or inequitable funding. Where such programs exist due to such reasons, the president should recommend that the programs at a predominantly black institution be strengthened, and his actions should otherwise insure that the elimination of programs at a PBI will not disproportionately adversely affect opportunities for black students or for the attraction of white students.

(2) Add at the end of E (2) the following:

New high demand, high cost, and graduate level academic programs should be considered for placement at the predominantly black institutions first. Predomi-

nantly white institutions will not be permitted to institute any such programs until the predominantly black institutions have been sufficiently enhanced and have ben attracted a sizeable number of white students. Graduate level programs at the predominantly black institutions should not be duplicated at the predominantly white institutions.

(4) LSU Law School and Southern Law School should enter into cooperative agreements providing for students from one school to take courses at the other. To the extent consistent with ABA standards for required course offerings, the board should consider insuring that certain high demand course offerings are not duplicated between the State's two public law schools. LSU must undertake vigorous recruitment efforts to attract black students, including the offering of a substantial number of other-race scholarships. The governing board should establish recruiting and retention plans for black students and recruiting plans for black faculty and administrators to the law school.[1]

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[1] The suggestion (p. 92) for the transfer of Southern students to the LSU Law Center "transfer of some of its black first year students"—is fraught with potential for manifold problems and paradoxical results; for example:

1. The pool of talent in Southern's student body could be significantly diluted.
2. The self-concept and motivation of Southern's students could be lowered.
3. The first-time bar-exam passage rate for Southern graduates could fall.
4. Students choosing to matriculate at Southern may have to be compelled to do so at another.
5. Numerous other technical and real problems involving recruitment, admission, combination, and academic programs at Southern would be generated.

In other words, the "transfer" recommendation presents a real risk that events in the collaborative process could make the unadorned suggestion of the Special Master seem like a prescription for abolishing the Southern Law Center altogether, subject to a

F. *Enhancement of Predominantly Black Institutions*

2. *Restatement and Amendment*

(2) To help guarantee adequate expenditures of enhancement funds, a minimum fixed percentage of the State budget for higher education should be set aside for enhancement of predominantly black institutions. This minimum percentage shall not fluctuate from year-to-year, so as to permit planned expenditures. When increases in State funding are forthcoming, an even greater share should be devoted to enhancement projects.

For enhancement capital projects, more should be undertaken during times of increases to the State's educational budget. The projects so approved by the Board of Regents and recommended by the Executive Branch in any previous or current budget recommendation should be implemented at once. A study to ascertain the need for additional capital outlay enhancement projects should be identified pursuant to a study authorized by the governing board, to be completed within 120 days.

Similarly, approximate amounts for operating expenses for at least the 1989-90 year can be given on the basis of the record as follows:

(a) Appropriation for newly started enhancement programs and for existing enhancement programs in an amount comparable to those approved for the 1988-89 fiscal year.

(b) Dollars for enhancement of existing programs and for accreditation of programs, especially in the areas of engineering, computer science, nursing

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short delay, despite its preeminent role as an example of desegregated legal education.

Additionally, we believe that LSU's Law Center is capable of adjusting its admission process and educational program to desegregate its institution without a compulsory transfer program at Southern.

mass communications, education, architecture, public policy, business and regional accreditation should be appropriated in amounts of $4 to $5 million for each of the next three (3) years.

Those funds are to be appropriated beginning with 1989-90 fiscal year to the universities and made available to them once budgets for their expenditures have been submitted and approved by the governing board and other pertinent authorities with the understanding that only those funds as justified in the budget will be expended.

(3) The Southern University Law Center and the Louisiana State University Law Center should be funded on the same formula basis. Parity monies should be restored by way of the formula to the Southern University Law School.

(4) Southern University as one of two land grant institutions of this State should be appropriated non-formula monies each year for its land grant functions. Such funding has been recommended by the Board of Regents and should be initially be $2.3 million per year, beginning with the 1989-90 year.

G. *Other-Race Recruitment and Retention*

(1) Add at the end of G(1):

Inasmuch as the record demonstrates a greater reluctance on the part of whites to attend predominantly black institutions, a larger sum for scholarships for other-race students should be provided by the State for the first five years, over and above the percentage of the predominantly black institutions' budgets that all institutions will have to commit.

H. *Other Comments and Recommendations*

Southern does not agree with the interim procedures part of the "Remedial Plan" which is vague and seems

fraught with the opportunity for delay. There must be guarantees of adequate funding of predominantly black institutions during any transition period. And the predominantly black institutions must have special protection against future cuts that negate enhancements. Further, the suggestion of a five year period to review progress under the plan is unrealistic since the moves to selective admissions, enhancements, community colleges, and doctoral ungradings will take up most if not all of that period. A period of years beyond that must necessarily be involved to give the plan a fair test.

A Southern University System comprised of Southern University and Agriculture and Mechanical College (including Cooperative Extension and Agriculture programs, such as the Center for Small Farm Research) at Baton Rouge as the lead institution, Southern University at New Orleans and the Southern University Law Center should continue to operate as a system of institutions, since these institutions share resources in finances and computer database. This appears contemplated by the graphic presentation of the new system, but deserves clarification.

We respectfully urge the Special Master's consideration of these amendments.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties to this proceeding, by mailing the same to each by First Class United States mail, properly addressed and postage prepaid on this 2nd day of May, 1989.

/s/ William J. Jefferson
WILLIAM J. JEFFERSON, ESQ.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

UNITED STATES' RESPONSE TO THE SPECIAL MASTER'S RECOMMENDED REMEDIAL PLAN

Pursuant to the Special Master's Minute Entry of April 18, 1989, the United States, plaintiff herein, respectfully submits its response and proposed amendments to the Special Master's Recommended Remedial Plan filed on April 18, 1989.

INTRODUCTION

The United States has serious concerns about the sufficiency of the Special Masters' Recommended Remedial Plan (hereafter "Remedial Plan"), and accordingly we raise specific objections and offer suggested amendments to certain provisions of the Remedial Plan.

Our principal objection to the Remedial Plan is that it is not specific enough and therefore cannot be adopted as a plan that "promises realistically to work, and promises realistically to work *now*." [1] In most respects we

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[1] See *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 439 (1968) (emphasis in original).

agree with the general *outline* of the plan—that there should be reclassification of the various universities, program transfers, enhancement of PBIs, and so forth—but we believe it is also critical for the plan to *fill in* this outline with specific requirements. Indeed, we would suggest that it is in this "filling-in" function that the Special Master can make the greatest contribution to this case: the Special Master has a familiarity with the witness testimony and expertise that makes it easier for him to undertake this task than the court (which, after all, could have drawn up an outline on its own), and the Special Master has an objectively and constitutional duty which will distinguish it from any new board, however, distinguished. Moreover, without clear, particularized requirements, we fear this lawsuit will drag on literally into the next century. This will disserve the mandated aim of immediate desegregation and will also postpone the day when the administration of the State's higher education system will be the business of the State's educators—not its lawyers, the United States' lawyers, and this Court. The United States hopes that that day would be achieved no more than five years from now, but that will be impossible if a detailed plan is not adopted immediately.

It is in our view especially important that the Special Master and the Court adopt a plan that promises to work *now* in light of the long and protracted history of this case. This litigation originated from a determination by the Department of Health, Education and Welfare (HEW) in 1969 that the State of Louisiana was operating a system of public higher education that was not in compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Pursuant to a referral from HEW, the Attorney General initiated suit against the State in 1974, and following extensive discovery the parties entered into a consent decree in 1981. During the six year period between September 1981 to December

1987, the State failed fully to implement this decree, and in August 1988 this Court determined that the State had failed to achieve the desired goal of eradicating all vestiges of Louisiana's former racially dual system of higher education. The parties engaged in extensive settlement negotiations—which included active participation by the Governor—between October 1987 and March 1989, but these efforts were unsuccessful. Between August 1988 and March 1989, the parties again engaged in extensive discovery in preparing for a remedial trial, which was held on March 13-15, 1989.

The Special Master issued his Recommended Remedial Plan on April 18, 1989. That plan relies heavily upon a suggested new single governing board to develop and implement a final plan. It provides, in part, that the new board should be "assembled as expeditiously as possible," and that if "board members have not been appointed and confirmed within three months after the Court's order, the Governor should be required to report back to the Court, explaining the delay and proposing a timetable for completing the board selection process." The Remedial Plan states that the board "should assume responsibility for managing the state university system as soon as it is able to appoint a system president . . . ."

Thus, the manner in which of the State of Louisiana must implement a desegregation plan has been at issue for 20 years, but the Remedial Plan suggested by the Special Master does not offer specific recommendations which show promise of bringing this litigation to termination and leaves open numerous issues and questions for the new board to resolve. Instead, the Remedial Plan requires that the new single board be assembled "as expeditously as possible." In light of the protracted history of this case and the reasonable and available means to ensure that a final remedial plan will be developed and implemented immediately, we believe that the Special Master's Remedial Plan is not constitutionally accepta-

ble. The Plan seems to assume that the possibility of some step being taken in the interim that the new board may ultimately question justifies there being *no steps* taken during the interim; we disagree. In all events, if the Plan spells out, as we think it must, the steps to be taken, the danger of a "misstep" in the interim evaporates. The time has come for a plan which "promises realistically to work and promises realistically to work now"; the time for "all deliberate speed" has long since passed.

The failure of the Remedial Plan to mandate specific actions in several key areas—thereby making the plan vague and leaving the critical issues for resolution by the new single board later—ensures that there will be further litigation.[2] To give just one exmple: the Remedial Plan leaves to the new board the discretion to determine which programs will be transferred between the two institutions in Baton Rouge. Officials at these two institutions have vigorously disagreed on the issue of whether program transfer is a workable desegregation approach, and the State—including the Governor—has also vigorously contested whether this approach is workable and sound. In spite of this clear history, the Remedial Plan leaves open the question of what programmatic approach —program transfer, cooperative efforts, or exclusive program assignment—will be used to desegregate the Baton Rouge area. We believe this is tantamount to leaving this area to future litigation. There is no legitimate reason why this issue, and others as discussed below, cannot be resolved now. Indeed, Grambling and Louisiana Tech

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[2] Establishment of a single board cannot be viewed as a terminal step in this case. The Court will continue to have jurisdiction of this case and the decisions of the single board will be reviewable to ensure that they are consistent with applicable orders. Thus, each time the single board recommends an approach to an issue left open by the Remedial Plan, the potential for further litigation will be great—particularly in light of the controversial nature of this case and its protracted history.

have clearly demonstrated that a cooperative spirit and hard work yields results. They have shown that the duplication issues *can* be addressed now. Therefore, the Remedial Plan should be specific in this area, and since the institutions (excluding Grambling and Louisiana Tech) involved and the State have failed and refused to offer a workable approach, we believe the Special Master—or the Court—should make specific findings on what must be done.

Below we discuss particular provisions of the Remedial Plan. For some provisions discussed we raise specific concerns that justify rejecting or modifying the provision, and where a provision can be modified we offer amendments or modifications.

A. SINGLE BOARD

1. *Concerns and Reasons for Modifying*

While correctly acknowledging that the single board is not a panacea to desegregation, the plan not only embraces the scheme but exalts the single board as its centerpiece. Most troubling is the fact that all decisions concerning other provisions of the plan are held in abeyance pending the establishment of the single board. (Plan, at pages 107-108, 111-123). There is no compelling reason for such a delay in implementation of the plan. This delay is not only inconsistent with the Court's directive concerning plan development, but also ensures that there will be no specific final plan until the single board completes its evaluation process, thus placing the parties and the Court in the same positions in which they stood in November, 1988—reviewing and evaluating the desegregation proposal filed by the parties. The only difference here would be that a single proposal, that of the single board, would be before the Court. In view of the fact that there have been serious disagreements among the State, the two predominantly black institutions, and the United States, it is unreasonable to expect that the single

board will develop and offer specific proposals that will be accepted by all parties. Consequently, the vagueness of the Remedial Plan—and delegation to the new board to make the hard decisions that must be made—ensures that further litigation will occur.

We remain skeptical that the record in this case can support the finding that a single board is warranted or that it will enhance desegregation. We will not, however, reargue the facts and law on this issue in light of the Special Master's Minute Entry. In all events, we adhere to our position that we do not object to the creation of a single board if the Master and the Court conclude that the multi-board system is a vestige of past discrimination or that it is impeding successful desegregation. Our position remains that a single board can be an appropriate education decision by state officials provided it is a part of a comprehensive desegregation plan. What is not acceptable is the Remedial Plan's proposal that the single board be given the carte blanche discretion to resolve numerous key issues and therefore, in effect, to prepare the comprehensive desegregation plan itself.

The presumption that the creation of such a board is itself sufficient to ensure elimination of the vestiges of segregation in Louisiana's higher education system is without support in the record of this case and is without factual corroboration in the annals of higher education desegregation. The grounds cited for support of the proposal to establish the single board do not survive close scrutiny.

First, it is suggested that a single board is likely to be more efficient than the current governance structure and may lead, therefore, to reducing the extensive program duplication and "freeing up" funds to aid in the desegregation process. References to efficiency are of course appealing, especially when the State seems to be short of money, but there is little reason to hope that the single board will lead to substantial economies. Nor is there

evidence that single board states *per se* are any more successful than multi-board states in reducing the program duplication that perpetuates segregation. There is, in particular, nothing in the record of this case indicating that any state has employed the single board concept as a means of remedying a constitutional violation.

Second, it is suggested that "factionalism and rivalries produced by the present organizational structure make it difficult to concentrate attention upon goals of either desegregation or efficiency" (Plan, page 43) and it is implied that the single board structure will somehow not be susceptible to such pressures. Again, however, there is no basis for such an implication. See Testimony of Governor Roemer (Feb. 23, 1989 deposition), (at page 85 line 10-page 88 line 4). Testimony of Dr. Kerry Davidson (Feb. 10, 1989 deposition), (at page 97 line 24-page 99 line 12; *id.* at page 102 line 9-page 103 line 19; *id.* at page 109 line 23-page 110 line 5).

Finally, it is suggested that "those opposing the single board solution are forced to argue that structure of higher education is irrelevant to the goals of desegregation. That is not an easy proposition to sustain." (Plan, page 47). But the position of the United States is simply that there are no compelling reasons nor is there any evidence to suggest that a single board structure is necessarily superior to a multi-board or decenrtalized governance structure in advancing desegregation—and that therefore the creation of a single board does not diminish the need for the other necessary specifics of a desegregation plan. The record, including the testimony of each witness supporting the single board structure, is devoid of any factual evidence in which a single board has been established as a mechanism to advance higher education desegregation. Thus, for example, the Special Master recognized that Dr. McTarnaghan's testimony on the benefits of a single board related "more to efficiency than the question of desegregation" (pages 47-48).

2. *Amendments and Modifications*

a. In view of the fact that there currently exists four boards whose members were appointed under the State's constitutional process, the Special Master should himself review the backgrounds and qualifications of the members of the current boards and designate 17 members who would constitute the new single board. In addition, the Special Master should determine the initial term of service for each member, with each having a 3, 4, or 5 year term. Upon the expiration of each member's term, the vacancy shall be filled by appointment of the Governor with confirmation by the State Senate. The new board, as proposed herein, should determine the manner in which the student member is chosen and his or her term of service. By selecting the board members the Special Master can address all of the concerns discussed in the Remedial Plan—*e.g.*, ensuring that the board is desegregated and that its members will be able to implement the final plan approved by the Court.[3] We believe that this approach is justified in light of the evidence in the record which clearly shows that the appointments of the members to the curent boards occurred in a racially discriminatory manner.

The single board shall then immediately begin the process of advertising the position of president. The process shall be completed and the position shall be filled not later than one year from the entry of the Court's plan. In the interim, the present Commission of Higher Education shall serve as Interim President and shall administer the system consistent with the goals of the Court's plan.

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[3] We will not reiterate our objections to a racial quota for the board's composition, except to point out that the assertion that "there is no effective race—neutral alternative" (Remedial Plan, page 56) is at odds with the recognition that "[t]here are, of course, other assurances that the single board will not work to the disadvantage of historically black institutions or concerns" (Remedial Plan, page 58). The same is true for the campus advisory committees.

b. In light of the protracted process followed in arriving at this plan and the need to ensure that this litigation someday reaches a termination point, the board should not be authorized to make any changes to this plan unless approved under the following process:

i. Any proposed change or modification shall be described in writing. As part of the description of the proposed change, the board shall provide a full explanation of how the change would impact on the implementation of the Remedial Plan.

ii. The board shall provide a copy of the above-mentioned written description of the change to all parties at least 60 days prior to the proposed implementation date.

iii. All parties shall advise the board in writing of their position on the change. If any objections are filed, the objecting party(ies) shall meet with the board in an effort to resolve any disputes amicably. If an amicable resolution cannot be reached, then the Court shall be apprised of the matter and shall conduct a conference, and subsequently a hearing if necessary, in order to resolve the issue.

iv. No change shall be implemented without court approval.

c. Additionally, a special vice-president for desegregation compliance should be selected by the president of the board; and appointed by the board. The vice-president for desegregation compliance shall be an individual possessing knowledge of and experience with higher education desegregation, whose mission is to oversee the implementation of the Court's plan. The vice-president for desegregation compliance shall be responsible for reporting and providing information to the Monitoring Committee at the committee's request. In any event, an annual report shall be submitted to the Monitoring Committee, the parties to this litigation, and the Court.

B. CLASSIFICATION OF STATE UNIVERSITIES[4]

1. Regarding paragraph (1), the board shall implement the scheme described below for classifying each state university according to its mission, graduate and research programs, and degree of selectivity in admissions. Such classifications are aimed specifically at differentiating the missions and academic programs of proximate PWIs and PBIs but also at differentiating the missions and academic programs of institutions placed in the same classification tier. In no event shall the board exceed 90 days in the development of such differentiated missions and academic program schemes. Said differentiated missions and academic program schemes should be submitted to the Monitoring Committee, the Court, and the parties prior to implementation.

2. Regarding paragraph (3), the new board shall be responsible for developing a realistic timetable for phasing in selective admissions criteria at SUBR, with imposition of selective admissions criteria not to exceed three years from the imposition of selective admissions criteria at the other doctoral institutions.

3. Regarding paragraph (4), the new board shall within 60 days set exact graduate missions and admissions criteria for these institutions. Care should be taken to ensure that at least some of these institutions, as appropriate, move away from open admissions toward some degree of selectivity, but less selective than the criteria imposed at the doctoral institutions.

C. SELECTIVE ADMISSIONS STANDARDS

1. Regarding paragraph (2), the precise formulation of the criteria for each institution shall be developed

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[4] The amendments/modifications described herein are to be considered in conjunction with the Special Master's Plan and not as replacements therefor. The numbers indicate the paragraphs in the Final Recommendation Section of the Plan as set forth by the Special Master.

within 90 days of the entry of the Court's plan and shall be forwarded to the Monitoring Committee, the parties and the Court prior to implementation.

2. Regarding paragraph (3), the new board shall develop appropriate programs of high school coursework that will be required for admission at each institution. The programs of high school coursework shall be developed within 180 days of the entry of the Court's plan and shall be developed in consultation with the Board of Elementary and Secondary Education, which shall ensure that sufficient resources are in place within one year to meet the demand.

3. Regarding paragraph (2) and (4), the United States believes it will be a grave mistake to require any university in the system to admit students solely because of race which the university legitimately believes to be less qualified than its other students. Not only does this undermine the purpose of classifying the universities and promulgating selection criteria and (see Remedial Plan, page 71 n.18), it will disserve the students who are supposedly the beneficiaries of this preference. Thus, we join Southern University in opposing the use of race-based "exceptions." See Plan, page 29.[5] Similarly, while we agree that standardized test scores must be used carefully, we do not think that their use—or the use of any selection device—should be forbidden simply because it has a disparate impact on a racial group. Their use should be permitted so long as the State can show that it legitimately serves to predict students' future performance, and so long as there is no showing that alternative selection criteria would have the same or better predictive validity with less disparate impact. In our current appeal in the Mississippi higher education case (*Ayers* v. *Allain*,

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[5] See also T. Sowell, *Education Assumption Versus History* 130-152 (1986). Where schools and students are "mismatched," the result is high failure rates, stigmatization, and resentment.

5th Cir. No. 88-4103 pending), for instance, we oppose the State's use of the ACT as the sole admission criterion, because the test designers themselves said that the use of the test in conjunction with high school grades would *better* predict college performance (and with less disparate impact). A preordained "mix" of students is not required for desegregation in the primary and secondary let alone the higher, education context. See *e.g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 26 (1971), and what a university may voluntarily decide to do in the name of "diversity" is quite different from what it is within a court's power to order the university to do. Of course, where the ACT is not a valid predictor, alternative selection means should be available to all students. To say that the ACT must "be employed in a positive rather than a negative fashion" is unrealistic: the "positive" effect of its use—or nonuse—for one student is always "negative" for another.

D. COMMUNITY COLLEGES

This section should be amended in three ways. First, in light of the experience the State already has in operating community colleges, the presidents of the present community colleges shall be directed to meet and develop articulation agreements which shall be submitted to the new board within thirty (30) days after a final plan is approved by the Court. Second, each articulation agreement shall include, among other appropriate provisions, a provision which allows automatic transfer to any four-year institution for students enrolled in any community college who obtain an associate degree with a cumulative G.P.A. of 2.7 (on a 4.00 scale) in required academic courses and have at least three recommendations from instructors recommending that the student attend a four-year institution. Third, in light of several factors we believe that the final plan should require that SUNO be enhanced and made a quality institution to serve as the

comprehensive four-year institution in the New Orleans area. Failure to do this may negatively impact on the effective implementation of a final plan. For example, the University of New Orleans (UNO) will become a doctoral institution with selective admissions and Delgado will offer only two-year programs. Thus, without having a quality comprehensive institution in New Orleans there will be a void in the availability of higher education—*i.e.*, an institution to serve students who do not qualify for UNO and those who do not wish to attend a two-year institution.

E. PROGRAM TRANSFER AND ENROLLMENT MANAGEMENT

1. Under paragraph (1), the following shall be inserted after the second sentence: The program transfers and exclusive program assignments which are common to the State's initial plan, the United States' amended plan, and the Southern University amended plan, along with those contained in Appendix B, shall be implemented with the commencement of the 1989-90 school year. As of the commencement of the 1989-90 school year, seniors and juniors enrolled in the transferred programs at the sending institution shall be allowed to continue until graduation of their respective classes. Freshman and sophomores shall be provided automatic admission to the receiving institution, and all grades and credits acquired at the sending institution shall be accorded full recognition at the receiving institution. Any students wishing to transfer to any other public instituton shall be accepted on the same basis and through the same procedures as any other transfer applicant.

2. Regarding paragraph (3), it should be specified that the board shall assign the president the mission of reviewing all current course offerings and that he will, as appropriate, develop additional program transfers and exclusive assignments of present and future high demand

programs consistent with the aims of the Court's plan. Such additional program transfers and exclusive assignments of high demand programs shall be developed not later than the end of the first semester of the 1990-91 school year and submitted to the Monitoring Committee, the parties, and the Court prior to implementation.

3. Regarding paragraph (4), it should be specific that LSU Law School and Southern University Law School shall enter into cooperative agreements providing for voluntary transfer of students consistent with the goals of the Court's plan. Transferring students' grades and credits shall be accorded full recognition and acceptance at the receiving institution. A cooperative agreement shall be developed providing for cross-registration between the two schools and for sharing of courses and team instruction. Additionally, LSU Law School shall develop and implement a comprehensive, detailed, and rigorous plan to increase other-race enrollment. The cooperative agreements shall be developed within ninety days of the entry of the Court's plan. The recruitment plan shall also be developed within 90 days of the entry of the Court's plan and shall be submitted to the Monitoring Committee and the parties prior to implementation. Each law school shall continue to offer a full complement of the basic courses required for graduation and consistent with eligibility to sit for the state bar examination. As we said in Part C, *supra*, the State should not be required to admit students based on race rather than merit. We note here that the Remedial Plan (at page 91) states that "LSU's Law's low percentage of blacks seems to be a function of an admissions policy that makes no effort to attract black applicants"; accordingly, what is needed is not a lowering of admission standards or a policy of "exceptions", but more vigorous efforts to attract black applicants and transfer in the first place.

F. ENHANCEMENT OF PBIs

This issue was the principal stumbling block preventing settlement of this lawsuit. Accordingly, the resolution of the precise level of funding must be ensured by the Remedial Plan, and the following should be inserted at the end of paragraph (1): The PBIs shall within ninety days of the entry of the Court's plan submit to the Court and the parties a list of *justified* enhancement projects separated into two categories, program and capital outlay. The lists shall be itemized, prioritized, include cost estimations, projected timetables, and an explanation of how the project will assist in reaching the goals of the Court's plan. The parties shall within sixty days file their respective comments concerning the enhancement lists and the Court, if deemed appropriate, shall schedule a hearing to receive additional comments. Thereafter, the Court shall enter an order specifying acceptable enhancement projects and scheduling the completion of said projects.

G. OTHE RACE RECRUITMENT AND RETENTION

1. A final paragraph should be added: Funding for the preceding programs designed to recruit and retain students of other races shall be provided by the State in addition to normal or regularly funding and shall not be subject to budget cutting or austerity programs.

2. In addition, paragraph (6) should be deleted. The approach set out in that paragraph will ensure a powerful incentive to discriminate against black students and in favor of white students who wish to attend PBIs, and against white students and in favor of black students who wish to attend PWIs. As discussed in Part C., *supra*, all admissions should be based on merit, not race. The contrary approach is not required by law (see *Swann*, *supra*), nor is it sound policy. An additional irony is that this will disproportionately advantage the PWIs to

the detriment of the PBIs, since it will almost certainly be easier to the former to attract other-race students than the latter.

H. EQUAL EMPLOYMENT

The Special Master's Plan does not appear to include requirements that the State of Louisiana implement any action to remedy the obvious racial identifiability of the administrative and faulty staffs at the institutions. The Special Master recognizes the need for desegregated staffs (Plan page 99), but fails to require the State, the single board, or any other State entity to employ any strategies or actions designed to create desegregated faculties and administrative staffs. The United States submits that, at a minimum, the final recommended plan should include the equal employment actions described in Section C—Equal Employment Opportunity (pages 20, 23-25) of the United States' plan filed on January 23, 1989.

I. MONITORING COMMITTEE

Paragraph (1) should require that a five-member committee shall be appointed by the Court to monitor progress toward desegregation. Names of experienced persons unconnected with the instant litigation and not previously or currently employed by any Louisiana state entity and reflecting a balanced and responsible view of the desegregation process shall be submitted by the parties for the Court's review. The names of prospective Monitoring Committee members shall be submitted not later than sixty days after the entry of the Court's plan.

CONCLUSION

The recommendation of an amendment to a section of the Special Master's Recommended Plan or the lack thereof does not constitute agreement with or approval of any section of the plan. The United States specifically re-

serves the right to object to the Court regarding any portion of the Special Master's Recommended Plan. More specifically, we recommend that the Special Master adopt the suggestions the United States has offered herein, and that the Special Master take 45 additional days to finalize the Remedial Plan, consistent with our suggestions and comments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing United States' Response to the Special Master's Recommended Remedial Plan has been served to the following counsel by overnight courier service:

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This the 1st day of May, 1989.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

v.

STATE OF LOUISIANA, *et al.*,

PROPOSED AMENDMENTS TO RECOMMENDED REMEDIAL PLAN

NOW COMES the GRAMBLING STATE UNIVERSITY ALUMNI ASSOCIATION (GSUAA), through its counsel, THOMAS N. TODD, and offers the following amendments to the Special Master's Recommended Remedial Plan:

AMENDMENT I

GRAMBLING STATE UNIVERSITY SHOULD BE ALLOWED TO CONTINUE TO OFFER DOCTORAL DEGREE IN DEVELOPMENT EDUCATION

1. At Page 64, of the Special Master's Recommended Remedial Plan, footnote 12, there is a discussion of whether GRAMBLING STATE UNIVERSITY, (GRAMBLING), as a proposed Comprehensive University, should retain its doctoral degree in Developmental Education. This "anomaly", as it is described, with respect to GRAMBLING and other non-doctoral institutions, should be studied by the new Board.

2. While we understand that there is a desire to keep the integrity of the newly proposed tier system, so that universities can be clearly identifiable, however, it is submitted that each case must be taken on its own merit.

3. The Doctoral Degree in Developmental Education at GRAMBLING is not simply a "doctoral degree". It is the "centerpiece" of a *unique* experiment carried out at GRAMBLING, which has a demonstrable quantity of qualitative success. First, the degree of offering must be put in context. GRAMBLING has one of three (3) Master's programs in Developmental Education in the nation. Secondly, GRAMBLING offers the *only* Doctoral Degree in Developmental Education in the *nation*.

4. Even a cursory examination of the proposed remedial plan herein, an examination of the record in this case, and an examination of general trends in education throughout the nation, will disclose that some type of remedial education is an absolute requirement for many of *our* students, if they are going to have a chance at success. Since remedial education is so important, (in this plan a major role of the newly created comprehensive community college system), *WHERE WILL THE TEACHERS LEARN TO TEACH WHAT THESE STUDENTS NEED TO LEARN*? The answer in Louisiana, and for other parts of the country, is at Louisiana's "national" university, GRAMBLING. Because of this uniqueness, GRAMBLING's remedial education program is not just remedial education, it is much, much more. This is innovative, pioneering education, with an eye on the future of Higher Education in America. One would expect no less from a "national" university. Let's look at the program. The remedial program at GRAMBLING is biforcated:

a. It provides needed help to students at GRAMBLING who because of certain academic deficiences require

its services. To this end, it has been tremendously successful. (See attached documents A and B)*.

b. The students who need remedial education provide the laboratory or practicum experience for our graduate students pursuing their Master's and Doctoral Degrees respectively.

No other university in Louisiana, nor in the nation has tihs unique arrangement. Further, based on the record in this case, using this approach, GRAMBLING graduates a high number of what are considered "high risk students" given little chance of graduating. (See Caillier Testimony, TR p. 91; Recommended Remedial Plan, p. 15).

5. This accomplishment of GRAMBLING is even more impressive when we look at Wharton's Testimony. As the former Chancellor of LSU-BR campus, he testified that when Black students with GPA averages of about 2.5 and ACT scores of about 11-13, about the average for students at GRAMBLING, were admitted to LSU-BR, (the "flagship"), the graduation rate for those students was about 18%. (Wharton Testimony, TR p. 118). Further, he admitted that LSU-BR "was unsuccessful" in graduating high numbers of these students. (Wharton Testimony, TR p. 190). This, as much as anything else, underscores the significance of the work being done at GRAMBLING with students who need "extra help".

6. Since, one of the things being sought here is uniqueness of roles, scopes and missions to prevent duplication, how could GRAMBLING be more unique than it is now? Here is a program in *place*, *functioning* and *succeeding*. There is an old saying some of us are fond of using, I offer it here only because of its profound simplicity and complete appropriateness, *"If it ain't broke, don't fix it"*.

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* The attached documents are submitted for purposes of illustrations and for information only.

Therefore, the GSUAA urges that the *Recommended Remedial Plan* herein be amended to provide for a specific exemption to allow GRAMBLING, a comprehensive university, with open admissions, to continue to offer the doctoral degree in Developmental Education. There really is no need for further study by the Board or anyone else in this matter. The record is clear! The program works!

AMENDMENT II

1981 CONSENT DECREE PROGRAMS

1. The *Proposed Remedial Plan* herein makes no provision for funding programs established at the PBI's under the 1981 Consent Decree.

2. The omission is particularly puzzling, since the Special Master notes specifically the success of some of those programs in Lincoln Parish. (Recommended Remedial Plan, p. 95). For the plan not to provide for interim funding for these programs is to sentence them to *failure.* Consequently, work done successfully over the last seven (7) years would be lost. This would indeed be a waste of resources.

The GSUAA urges that the Remedial Plan be amended to provide for interim funding for 1981 Consent Decree programs, at least until the new single Board adopts a statewide remedial plan, or in the alternative, to provide direction for the PBI's as to what should be done with those programs.

AMENDMENT III

ENHANCEMENT OF PBI'S

1. The Recommended Remedial Plan provides for the enhancement of the PBI's by providing that, ". . . a fixed percentage of the State's Budget should be set aside for PBI enhancement", (P. 119). It is urged here that a specific percentage be provided for in the plan, both as to the State's budget and increased revenues for enhance-

ment of PBI's. Based on past experience in Louisiana, words like "substantial", "adequate", "guarantee" are too vague to protect the PBI's. To insure full compliance by the State, the percentages must be *spelled* out *with* the greatest amount of clarity and specificity. Anything short of that leaves the PBI's vulnerable to forces and influences within the State which do not have their best interest at heart. To further protect the PBI's, we urge that a court approved mechanism or device be established to deliver these funds to the PBIs. Wide discretion, in either how much the PBI's receive, or *how* they receive it, opens the door to a variety of mischief. The less the discretion, on the part of the State, in this area, the greater the likelihood of success.

AMENDMENT IV

MONITORING COMMITTEE

The GSUAA urges that the Monitoring Committee be increased from 3 to 5 members with proportionate Black representation. None of the members should have any association with the parties to this litigation.

The court should set, at a bear minimum, the parameters of the Monitoring Committee, its powers and its sphere of operation. This Committee should be an arm of the Court and not subjected to influence or control by any *state* entity.

WHEREFORE, the aforementioned reasons, we submit that the Recommended Remedial Plan should be amended as stated herein.

Respectfully submitted,

/s/ Thomas N. Todd
THOMAS N. TODD
Attorney for Grambling State
University Alumni Association

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing PROPOSED AMENDMENTS TO RECOMMENDED REMEDIAL PLAN has been served on the following counsel of record, properly addressed by depositing same in the United States mail, postage prepaid on this 1st day of May, 1989.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

vs.

LOUISIANA

VERKUIL, *Special Master.*

FINAL REPORT

[Filed May 30, 1989]

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I. PROCEDURAL OVERVIEW

On August 12, 1988, the United States District Court for the Eastern District of Louisiana issued an order granting the United States' motion for summary judgment against the State of Louisiana on the issue of liability for operating a dual college system based on race. *United States v. Louisiana*, 692 F. Supp. 642 (E.D. La. 1988) (three judge court). In its opinion, the Court determined that the current consent decree, under which the parties had operated from September 1981 until December 1987, had failed to achieve the desired goal of eradicating the racial identifiability of Louisiana's formerly black and white colleges. In fact the Court noted that, while not all contemplated funds were expended under the consent decree, the overall result during this period was more rather than less racial segregation:

> Despite the slight increase in black enrollment statewide, the racial polarization base increased as a whole during the term of the consent decree: the predominantly white institutions had about 2000 fewer black students in 1987 than in 1981, while the predominantly black institutions showed only a negligible increase in white enrollment from around 0.3% in 1981 to around 1.1% in 1987.
>
> In 1981, around 55% of the black students enrolled at institutions of public higher education in the state were enrolled at predominantly white institutions, while in 1987 the corresponding figure fell significantly to about 47%. (692 F. Supp. at 645.)

As a consequence, the Court determined that the consent decree process was a failure: "It is now apparent that the failure was not in spending too little, but rather was in the entire structure of the current decree." 692 F. Supp. at 658. The Court concluded by noting that a "drastic change" may be required and offered some suggestions:

> A possible remedy that suggests itself to the court would be one that (1) reduces the number of senior colleges and many of their duplicative programs, in particular, to avoid the duplication in institutions in the same vicinity, (2) institutes a system of a junior colleges with open admissions to all high school graduates, (3) institutes higher entrance requirements to the remaining senior colleges, and (4) reverts the state supervision over the institutions to a single board. (692 F. Supp. at 658; footnotes omitted.)

By Opinion and Order of November 22, 1988, the Court elaborated upon its concerns in observing that "a plan that would basically require the state simply to spend extra money on the four black schools—could show little, if any, likelihood of success . . . ." Noting that "no consensus plan has been proposed," the Court offered the guidance that the single board concept, previously suggested, "is likely to be a part of any remedy that will be adopted or imposed." This Order also informed the parties that in the event no acceptable plan was submitted, the Court would appoint a special master "for the purpose of assisting the Court in ordering a final remedial plan and judgment."

By Order of Reference dated December 2, 1988, Paul R. Verkuil was appointed Special Master and invested with the authority under Fed. R. Civ. P. 53 to review the proposed plans submitted by the parties "and to conduct hearings regarding the viability of the proposed plans,

and any other appropriate remedial measures." On December 16, 1988, the Counsel for the parties met with the Special Master. During the meeting a schedule was set for submission of amendments to remedial plans, for submission of written reports and for the scheduling of depositions. Also on this date David Boies of the New York Bar and Max Nathan, Jr. of the Louisiana Bar were appointed as counsel and Reginald Clark as assistant to the Special Master.

Amendments to proposed plans from all parties were submitted on January 23, 1989. On January 25, a status conference for attorneys was held by the Special Master at which the deposition schedules were discussed and set. During the next month the depositions of 33 witnesses for the various parties were taken. Periodic telephonic conferences were held by the Special Master with counsel to the parties under the guidance and in the offices of Max Nathan, Jr.

On March 1, 1989, a status conference with attorneys was held in the Special Master's Chambers, Room 300, U.S. Court of Appeals for the Fifth Circuit. The first item involved a motion for a protective order brought by the United States and Southern University to seal all pretrial depositions. Counsel for the Times-Picayune Publishing Corporation sought to intervene urging denial of the motion. The Special Master, while not ruling on the motion to intervene, ruled against the motion for a protective order. Under Fed. R. Civ. P. 26(c) protective orders can only be issued where good cause is shown. In this case the Master could find no specific example of embarrassment or need for confidentiality to be demonstrated by the moving parties. This decision was appealed to the Court and affirmed on March 2, 1989.

A further meeting of counsel was held on March 6, 1989, during which the designation of witnesses to be

heard live was made by the Special Master. The hearing commenced on March 7, 1989, in United States District Court, Room C552, at 8:00 a.m. At the opening of the hearing counsel for all parties approached the Master and stated that settlement negotiations were underway. In light of this development the parties requested an adjournment of the hearing. The Master thereupon agreed that the hearing would be adjourned pending settlement discussions on the condition that the pretrial depositions, written statements and exhibits could be entered into evidence, subject to specific motions to strike, as the parties' case-in-chief. All parties concurred in this approach and it was entered into the record by Minute Entry dated March 8, 1989. The remainder of the week was consumed by settlement discussions between the parties and by periodic meetings with the Master to report on the progress of the discussions.

On March 13, 1989, the parties met with the Special Master to discuss the progress of settlement discussions both generally and specifically with respect to Lincoln Parish (Grambling and Louisiana Tech). After learning from counsel that an overall settlement had not been achieved, the hearing was set for 1:00 p.m. that day to hear rebuttal witnesses and questions of certain witnesses by the Special Master. The case-in-chief was introduced in written form which included the statements of 78 witnesses along with the depositions of 33 and extensive exhibits. A complete list of witnesses is included as Appendix A.

The rebuttal hearing was conducted during March 13, 14 and 15, 1989. Dr. Tremblay, Dr. Caillier, Dr. Wharton, Dr. Conrad, Dr. Spikes and Dr. McTarnaghan were examined by the parties and the Master. Motions to strike were made on March 20 and ruled upon by the

Master on March 24. Post-hearing motions were also disposed of by the Master on that date. Post-hearing memoranda were served and filed on March 31.

On April 18, 1989, the Special Master filed a Recommended Remedial Plan with the Court. By prior agreement, the parties were permitted to comment on the plan and to submit proposed amendments, which were filed on May 2. Thereafter, on May 9, oral argument was held in New Orleans at which each party was permitted to present its own proposed amendments and to comment on the other parties' proposed amendments. At oral argument, the parties were requested by the Special Master to submit resumes of current board members for possible inclusion on an interim board.

This Final Report and the accompanying Proposed Order constitute the Special Master's final recommendation to the Court.

II. THE LOUISIANA SYSTEM OF HIGHER EDUCATION

Louisiana currently has seventeen general state institutions of higher learning, organized under four separate governing boards. The Board of Regents has general responsibility for planning, coordinating and reviewing the budgets and academic program offerings of each state university. Each of the three remaining boards has separate direct management authority for a number of the universities. The Louisiana State University Board of Supervisors ("LSU Supervisors") oversees: Louisiana State University and Agricultural and Mechanical College in Baton Rouge ("LSU A&M"), the University of New Orleans ("UNO"), Louisiana State University at Shreveport ("LSU-S"), Louisiana State University at Alexandria ("LSU-A"), and Louisiana State University at Eunice ("LSU-E"). The Southern University Board of Supervisors ("Southern Supervisors") oversees: Southern University at Baton Rouge ("SUBR"), South-

ern University at New Orleans ("SUNO") and Southern University at Shreveport/Bossier City ("SUSBO"). The Board of Trustees for State Colleges and Universities ("Trustees") oversees: Louisiana Tech University in Ruston ("Louisiana Tech"), Grambling State University ("Grambling"), University of Southwestern Louisiana in Lafayette ("USL"), Northeast Louisiana University in Monroe ("Northeast"), Northwestern State University in Natchitoches ("Northwestern"), Southeastern Louisiana University in Hammond ("Southeastern"), McNeese State University in Lake Charles ("McNeese"), Nicholls State University in Thibodaux ("Nicholls"), and Delgado Community College in New Orleans ("Delgado").

Of these institutions, LSU-A, LSU-E, SUSBO and Delgado have only two-year programs. Additionally, SUNO maintains a number of two-year programs as well as four-year programs. Two other public community colleges—Bossier Parish Community College and St. Bernard Parish Community College—are separately managed by the State Board of Elementary and Secondary Education and are no longer defendants in this case, having been granted summary judgment in the Court's August 2, 1988, ruling. 692 F. Supp. at 659-59. There is not, however, any statewide system of community colleges and a number of regions in the state—most notably the state capital of Baton Rouge—have no two-year community college.

The remaining schools listed above all have four-year undergraduate programs and varying programs for graduate studies. Three state professional schools are also organized under the same three management boards. The Louisiana State University Medical Center, located in New Orleans and Shreveport, and the Paul M. Hebert Law Center, located in Baton Rouge, are overseen by the LSU Supervisors. The Southern University Law Center, also in Baton Rouge, is overseen by the Southern Supervisors. Finally, LSU has a separate Agricultural Center in Baton Rouge, overseen by the LSU Supervisors.

The current governing structure for state universities was created as part of a revision of the Louisiana Constitution in 1974. Prior to 1974, statewide coordination was provided by the Louisiana Coordinating Counsel for Higher Education, itself created in 1968, which had more limited powers than the current Board of Regents. Most of the state universities were governed by the State Board of Education at that time, although the Louisiana State University Board of Supervisors separately governed the LSU schools. The 1974 constitutional revisions divided the direct governance for state universities into the three current governance boards and gave the Regents enhanced, though not complete, control over budgetary and program matters. The governance issue was recently revisited in the state legislature where a measure to amend the constitution and create a single governing board was introduced, but the vote came up short of the two-thirds approval needed to submit the proposed amendment to the state's voters.

As the Court's August 2, 1988, opinion discusses, four state universities—SUBR, SUNO, SUSBO and Grambling—were originally established as institutions for blacks only. 692 F. Supp. at 647. The remaining four-year state universities were established for whites only. It was not until some time after the enactment of the Civil Rights Act of 1964 that the State of Louisiana discontinued official recognition of state universities as single race institutions. With respect to most schools, de facto racial identifiability has continued to the present. The chart below (updating the chart provided in the Court's August 2, 1988, opinion, 692 F. Supp. at 645) notes the enrollment at each institution, by race, comparing 1981, the year the consent decree was implemented, with 1988.

Chart 1

Enrollment at Louisiana Public University By Race, 1981 and 1988

University	1981 Black		1981 White		1981 Total	1988 Black		1988 White		1988 Total
Trustees	#	%	#	%		#	%	#	%	
Delgado	3,371	40.1	4,348	51.7	8,404	2,257	31.5	4,268	59.6	7,161
Grambling	3,777	98.5	44	1.1	3,834	5,626	95.8	225	3.8	5,870
Louisiana Tech	1,194	11.6	8,489	82.5	10,288	1,236	12.7	7,186	73.7	9,751
McNeese	1,062	15.3	5,706	82.2	6,943	1,004	13.8	6,156	84.3	7,300
Nicholls	1,068	15.0	5,954	83.6	7,119	819	11.5	6,180	86.6	7,139
Northeast	2,431	22.0	8,544	77.2	11,071	1,539	15.1	8,461	83.0	10,193
Northwestern	1,296	19.4	4,448	66.6	6,682	1,258	19.5	4,768	74.1	6,438
Southeastern	1,112	12.6	7,633	86.2	8,854	577	6.7	7,868	91.7	8,582
USL	2,380	17.4	10,931	79.8	13,702	2,478	17.5	11,200	79.2	14,143
LSU Supervisors										
LSU-A	151	9.9	1,357	88.8	1,528	214	9.7	1,949	88.6	2,201
LSU-A&M	1,688	6.3	22,832	84.7	26,964	1,906	7.5	22,259	88.0	25,296
LSU-E	237	15.5	1,283	84.0	1,528	242	13.9	1,483	85.1	1,743
LSU Law School	16	1.9	830	96.1	864	30	3.8	746	94.9	786
LSU-S	315	7.6	3,803	91.5	4,155	381	8.5	3,991	88.9	4,490
UNO	2,491	16.1	11,519	74.6	15,432	2,439	15.5	12,053	76.5	15,752
Southern Supervisors										
SUBR	7,655	86.4	288	2.6	8,855	8,267	92.7	398	4.5	8,921
SUNO	1,994	82.4	11	0.5	2,420	3,130	83.9	436	11.7	3,731
SUSBO	661	99.8	1	0.2	662	1,118	89.7	122	9.8	1,246
Total	32,899	23.6	97,961	70.3	139,305	34,521	24.5	99,749	70.9	140,743

Source: Tremblay Witness Statement, Attachment A.

As the chart illustrates, the racial identifiability of Louisiana's state universities is especially evident in the fact that, in four areas of the state, predominantly black institutions (PBIs) and predominantly white institutions (PWIs) coexist in close geographic proximity. In New Orleans, SUNO currently has 83.9 percent black and 11.7 percent white enrollment, while UNO has 15.5 percent black and 76.5 percent white enrollment. In Baton Rouge, SUBR has 92.7 percent black and 4.5 percent white enrollment, while LSU A&M has 7.5 percent black and 88.0 percent white enrollment. In the Shreveport/Bossier City area, SUSBO has 89.7 percent black and 9.8 percent white enrollment while LSU-S has 8.5 percent black and 88.9 percent white enrollment. Finally, in Lincoln Parish, Grambling has 95.8 percent black and 3.8 percent white enrollment, while Louisiana Tech, in nearby Ruston, has 12.7 percent black and 73.7 percent white enrollment.

The governing boards of these universities are also racially identifiable. The Board of Regents currently has 16 members, 13 (81 percent) of whom are white and 3 (19 percent) of whom are black. Of the 18 LSU Supervisors, 14 (78 percent) are white and 4 (22 percent) are black. The Southern Board of Supervisors has 4 white (22 percent) and 14 black (78 percent) members. The Trustees are the most integrated of the four boards, with 13 of 18 members (72 percent) white and 5 members (28 percent) black. According to the most recent data available, the total population of the State of Louisiana is 4.5 million, 69 percent white and 29 percent black.

According to the statewide student profile compiled by the Board of Regents (SSPS), in the fall of 1988 only 27,146 freshmen enrolled in state universities, but given past patterns, most of them will not graduate. Of the 21,470 students who enrolled as first-time freshmen in the fall of 1982, only 7,133 or 33.2 percent had graduated by the spring of 1988, six years later. The chart below

shows the graduation rates for each of Louisiana's 17 universities over the same six-year period.

Chart 2

Graduation Rates at Louisiana Public Universities, 1982 to 1988

Institution	Number Enrolled Fall 1982	Graduated by Spring 1988 Number	Percentage
Trustees			
Delgado	705	106	15.0
Grambling	674	287	42.6
Louisiana Tech	1,644	761	46.3
McNeese	1,285	330	25.7
Nicholls	1,398	477	34.1
Northeast	1,580	534	33.8
Northwestern	745	258	34.6
Southeastern	1,695	546	32.2
USL	2,310	788	34.1
LSU Supervisors			
LSU A&M	4,486	2,103	44.9
LSU-A	421	88	20.9
LSU-E	270	89	33.0
LSU-S	464	110	23.7
UNO	1,931	364	18.9
Southern Supervisors			
SUBR	1,294	328	25.3
SUNO	352	30	8.5
SUSBO	216	24	11.1
TOTAL	21,470	7,133	33.2

Source: Tremblay Witness Statement, Attachment C.

As the chart shows, no state university in Louisiana graduated half of its enrollees within six years, and six institutions failed to graduate even one quarter of their enrollees. The national average for public universities is 44.9 graduation over six years. (American Council on Education, Digest of Education Statistics 249 (1988).)

The overwhelming majority of students enrolled in state universities in Louisiana are state residents. Ac-

cording to Board of Regents SSPS data, of first-time freshmen in the fall of 1988, 90.3 percent were Louisiana residents and 9.7 percent were non-residents. (Wharton Hearing Exhibit 6B.) Moreover, 58.5 percent of the first-time freshmen in this sample entered a university in their home parish or in a parish adjacent to their home parish, while 41.5 percent ventured further from contiguous parishes to attend college within the state.

The data also show that black students and PBIs account for a much greater percentage of non-resident students and students from non-contiguous parishes than do white students and PWIs. For instance, of the 2,627 non-resident students enrolling as first-time freshmen in fall 1988, 1,539 (58.5 percent) were black and 1,401 (53.5 percent) went to PBIs. By comparison, blacks made up only 28.0 percent of the total entering class and PBIs accounted for only 15.3 percent of total entering students. PBIs clearly attract more non-resident students and students from distant parishes within the state than do PWIs. In the fall of 1988, 33.7 percent of students at PBIs were non-residents and 63.4 percent came from non-contiguous parishes, while only 5.3 percent of students at PWIs were non-residents and 37.6 percent came from non-contiguous parishes. Non-resident black students are also far more likely to go to PBIs than are resident blacks. Overall, 52.7 percent of black students entering in the fall of 1988 went to PBIs, but the rate was 88.2 percent for non-resident blacks attending PBIs as compared to 43.6 percent of resident blacks. (Wharton Hearing Exhibit 6B.)

In fact, in 1988 only one state university, Grambling, a PBI, attracted more than half (55.4 percent) of its student body from out of state. Thus Grambling, with California supplying the largest number of students after Louisiana, is a "national" university in terms of the residences of its students. By comparison, at LSU A&M,

Louisiana's "flagship" university, only 8.4 percent of its student body came from outside the state.

In addressing the problems of desegregating state universities in Louisiana, it is also necessary to focus on the relative college preparation level and college-going rates for black and white high school students in Louisiana. According to data compiled by the Louisiana State Department of Education, there were 46,222 high school graduates in 1988, 15,018 (32.5 percent) of whom were black and 30,126 (65.2 percent) of whom were white. (Tremblay Hearing Exhibit 4.) Of these 1988 graduates, 38,844 (84.0 percent) came from public high schools and 7,378 (16.0 percent) came from private high schools. Public high school graduates were disproportionately black (36.7 percent black/60.9 percent white) while private high school graduates were disproportionately white (10.4 percent black/87.5 percent white). Viewed another way, 5.1 percent of black students graduated from private high schools, whereas 21.4 percent of white students graduated from private schools. This disparity is especially pronounced in certain areas, like Orleans Parish, where 83.9 percent of blacks go to public high schools but 90.0 percent of white students go to private high schools.

College-going rates in Louisiana are also much higher for white students than for black students. In 1988, 17,816 of the total 46,222 graduating high school students in Louisiana (38.5 percent) went to college but blacks accounted for only 4,263 of these college-going high school graduates, yielding a college-going rate for blacks of 28.4 percent. (Tremblay Hearing Exhibit 4.) By contrast, whites accounted for 12,647 college entrants, yielding a 42.0 percent college-going rate for whites. This disparity in college-going rates has remained relatively constant in recent years. Five years ago, for instance, in 1983, the college-going rate for blacks was 29.2 percent and the college-going rate for whites was 42.5 percent.

Of those students who do go on to state universities in Louisiana, whites are much better prepared than blacks. According to 1987-88 data from the American College Testing Program (ACT), the mean high school grade point average (GPA) for all public college attendees was 2.75. (Wharton Hearing Exhibit 6A.) The mean GPA for blacks, however, was 2.54 while the mean GPA for whites was 2.80. Likewise, the mean ACT score for blacks was 12.74 compared to an 18.67 mean ACT score for whites. This disparity in preparation is also reflected in the percentage of first-time freshmen in state universities who are enrolled in "developmental" (*i.e.*, remedial) education courses. According to Board of Regents data, in the fall of 1988, 12,897 (48.0 percent) of all first-time freshmen were enrolled in remedial courses, but the rate for black students (71.7 percent) was much higher than the rate for white students (38.5 percent). (Tremblay Hearing Exhibit 2.)

The Louisiana system of public higher education is faced therefore with a lower college-going rate than the national average and a lower preparation level on average, with black students in each case being behind white. In what was formerly a dual system of higher education, the PBIs still educate over 50% of the black students who enter higher education. The Court's concern which led to the appointment of a Special Master was precisely that during the period of the consent decree from 1981 to 1987, while more black students entered higher education, the percentage of black students educated at PBIs versus PWIs increased. Thus the issue of racial separation in higher education in Louisiana remains still to be resolved.

III. THE PROPOSED REMEDIAL PLANS

Following its August 2, 1988, summary judgment ruling, the Court ordered that proposed remedial plans be submitted by November 14, 1988. Four parties sub-

mitted plans in November: the State of Louisiana (through Governor Roemer), the United States, the Southern Supervisors, and the Grambling State University Alumni Association ("Grambling Alumni"). Three other state entities—the LSU Supervisors, the Board of Regents and the Board of Trustees—are separate parties to this action but subscribed to the single plan submitted by Governor Roemer. Following the Court's November 22 ruling and the appointment of the Special Master in December, each of the original proposed plans was amended. In developing this remedial recommendation to the Court, the Master reviewed both the original and amended plans and, to the extent they differed, did not consider himself limited to the proposals as amended.[1]

To aid in preparing the State Plan, Governor Roemer appointed a special Task Force on Desegregation of Public Higher Education in Louisiana following the Court's August 24 status conference. The Task Force was composed of 24 members, including two representatives from each of the four governing boards and one representative from each of eight state universities. It met for approximately eight weeks and developed one master desegregation plan for the state and four regional subcommittee reports (New Orleans, Baton Rouge-Hammond, Lincoln Parish and Shreveport-Bossier City) relating to special problems in those areas. The final Task

[1] The Special Master has also received numerous submissions from non-parties, ranging from short letters to full-scale remedial plans. These submissions reflect the breadth and depth of public interest in the issues raised by this case and illustrate the considerable implications of any remedial approach. But because the non-party submissions are so numerous, they could not be made part of the record without overly complicating this already complex case and unduly delaying its resolution. In only one situation was a proposed remedial plan submitted to counsel and read by the Master. This involved the Citizens Commission for Equity and Excellance in Louisiana Universities. This proposal is mentioned at the outset of the section entitled Discussion, Analysis and Findings (pp. 35-36 *infra*).

Force Report was submitted as an appendix to the State Plan. The State Plan, while not endorsing wholesale the Task Force proposals, adopted the same basic position on each of the Task Force's major recommendations.

The principal remedial proposal put forth by the State is the creation of a single governing board for all state universities in Louisiana to replace the current four-board structure. The State argues that infighting and factionalism among the three governing boards, combined with insufficient oversight authority in the Board of Regents, has led to excessive program duplication in Louisiana and an uncoordinated approach to desegregation. The State's new proposed governing board would vest ultimate authority over all budgetary, administrative and academic affairs of the state universities in a single board. This board would also be responsible for developing a "Master Plan," defining the role, scope and mission of each institution, and an overall plan for desegration. Members of the governing board would be drawn from each congressional district and the racial composition of the board would be set by statute to reflect the overall racial composition of the state population.

The State Plan also calls for restructuring the organization of state universities into tiers, with graduated admissions requirements. The State Plan would place LSU A&M alone into the top tier, making it the state's flagship school with the highest admissions requirements. There would also be a level of "doctoral" institutions, with intermediate admissions criteria, a level of "comprehensive" universities, with low admissions criteria or open admissions, and a comprehensive community college system with open admissions. The desegregation rationale behind the call for selective admissions and tiering is that such requirements will sort students out at universities by ability and areas of academic interest rather than by race. The State Plan recognizes that

admissions exceptions of up to ten percent might be required to ensure an adequate number of "other race" students at each state university.

To address the Court's concern about program duplication, the original State Plan proposed an aggressive plan of academic program transfers and exclusive assignment of high demand programs. These program transfers were centered on the four pairs of proximate PBIs and PWIs in the state. It was hoped that, by exclusively assigning certain programs to one school, students wishing to study in particular fields would have no choice but to attend that school rather than being able to choose between a PBI and a PWI. When the State filed its Amended Plan in January, however, it did an abrupt about-face on the issue of program transfer. Contradicting the recommendations of its own Task Force, the State now argues that there are so many potential pitfalls with program transfers (the transferee school may not be educationally equipped to offer the course, students and faculty associated with a program may not be willing to move to a new school) that they should not be broadly endorsed. Thus the State has withdrawn its support for any program transfers in the Baton Rouge and New Orleans areas and even opposed in its Amended Plan a number of transfers in Lincoln Parish to which Grambling and Louisiana Tech have both voluntarily agreed.

Based on the recommendation of the Task Force, the State Plan also opposes any merger of state universities. The State's position is that the merger of even proximate PBIs and PWIs is unwise because it would jeopardize the "important and historical role that Louisiana's predominantly black schools have played in educating our black children." (Original State Plan, at 19.) The State also argues there has been no demonstrated success in mergers that have been attempted in other states.

Although it is the plaintiff in this action, the original remedial plan submitted by the United States was quite modest. It neither supported nor opposed a single governing board, arguing that the current management structure "could be effective." (Original United States Plan, at 8.) On the issue of institutional duplication, the United States noted that there are "a number of workable techniques" including program transfer and exclusive program assignment, but it offered no specifics. The United States also voiced general support for tiering of state universities and the concomitant use of selective admissions requirements, but offered no specific proposals. Finally, the United States urged that increased state money be used to enhance the quality of academic programs and physical facilities at PBIs, in order to make them more attractive to other race students.

The United States' Amended Plan offered a number of more specific proposals. On the governance issue, the United States retained its "no objection" to the single board stance, but added two caveats. First, the United States "opposes strenuously the state's suggestion that gender, ethnic or—especially—racial quotas" be used in establishing the board. (Amending United States Plan, at 9 n.4.) Second, the United States argued that the creation of a single board should not delay the implementing of any other desegregation remedy.[2]

On the reclassification of state universities, the Amended United States Plan proposes five tiers, much

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[2] The United States estimates that it will take between 18 and 24 months to restructure the existing governing boards and objects to the State's suggestion that implementation of other remedial measures be delayed until the single board is in position to oversee them. The United States argues that such delay is unnecessary and that implementation should begin immediately using an existing board, like the Regents, if necessary, and then passing remedial work along to the single board when it is equipped to continue the task. This suggestion is addressed in the section entitled Interim Procedures (pp. 113-120 *infra*).

along the lines of the tiers proposed by the state: research universities (LSU A&M only), professional institutions, doctoral universities, comprehensive universities and community colleges. There would be graduated admissions requirements at the four-year universities under the United States' Amended Plan, with LSU as the flagship school having the highest standards and the community college system retaining open admissions. As with the single board, the United States firmly opposes the use of racial quotas for admissions requirements exceptions. Instead, the United States proposes "race neutral" exceptions for "high risk students" (Amended United States Plan, at 11)—a term it leaves undefined.

To eliminate unnecessary programs, the United States proposes a series of academic program transfers, including the exclusive assignment of a number of programs to one or another of the proximate state universities. The United States' proposals in this regard are much like those contained in the State's Original Plan, but abandoned in the Amended Plan. To help ensure that state universities attract other race students, the United States also suggests that nondiscriminatory enrollment ceilings be placed on popular courses at certain universities. The ceilings would prevent students from overenrolling in programs at one university rather than attending an other race school.

Unlike the State Plan, the United States Amended Plan focuses on enhancement of PBIs as a crucial desegregation remedy. Notwithstanding that the Court has declared the consent decree no longer in effect, the United States urges that the State must "comp'ete" its obligations under the consent decree, and spend money to enhance academic programs and facilities at PBIs. In order to continue receiving enhancement funds under the United States Plan, the PBIs would have to take steps to ensure that the programs receiving funding also obtained necessary accreditations and otherwise met certain "quality" standards. Along similar lines, the

Amended United States Plan would obligate the State to monitor college-going rates for blacks and to implement recruitment programs designed to increase black enrollment at state universities. The proposed recruitment strategy would include developing strong equal opportunity policies at state schools, initiating an aggressive public information campaign, and devoting funds to scholarships for black students, in keeping with the State's "commitment" under the consent decree.

Finally, the United States proposes that these and all other desegregation remedies be overseen by a separate monitoring committee, not unlike the previous Consent Decree Monitoring Committee. The monitoring committee would have responsibility for reviewing all desegregation efforts, compiling relevant data, and filing an annual report with the Court.

The remedial proposal of the Southern University Board of Supervisors takes a much different approach, disagreeing with most of the remedies suggested by the State, the United States and even the Court. For instance, notwithstanding the Court's November 22, 1988, admonition that a single state governing board "is likely to be a part of a remedy that will be adopted or imposed," the Southern Supervisors come out strongly against a single board. The Southern Supervisors argue that a single board would over-centralize management of state universities, making the governing structure more distant, less flexible and less effective. Southern also claims that a single board would subvert the interests of black students, because there would no longer be a board having majority black membership to advocate and protect the special educational needs of black students.

For similar reasons, the Southern Supervisors generally oppose the advent of selective admissions requirements and the creation of a comprehensive community college system. Southern acknowledges that selective ad-

missions may be appropriate at LSU A&M as the state's flagship school, and even at Louisiana Tech and UNO, but argues that admissions requirements elsewhere would have a segregative effect, by forcing disadvantaged minority students out of selective upper tier schools and into open admissions lower tier schools and community colleges. Southern also argues that forcing selective admission requirements on the PBIs would undermine their special role in providing developmental education courses to disadvantaged and underprepared black students. Southern would accept—and indeed proposes—a tiered reclassification of state universities to help clarify the mission of each school, but opposes tying selective admissions requirements to the tiers.

Even to the extent that affirmative action programs and admissions exceptions for minority students might serve to get blacks admitted to selective schools, Southern maintains that such exceptions are degrading and ineffective in a broader sense. Students gaining admissions under an exception, and thus by implication other students of the same race, would, Southern asserts, be branded as inferior and stigmatized.

Related to Southern's opposition to selective admissions is its opposition to an enhanced role for community colleges—another step suggested by the Court. Southern argues that community colleges would become a dumping ground for disadvantaged minority students who would not qualify for admission to selective schools. An enhanced role for community colleges would also, Southern asserts, undermine the well-developed and effective developmental education programs now in place at the PBIs.

To address the problem of academic program duplication, Southern proposes a number of program transfers, almost exclusively transfers *from* PWIs *to* Southern and not from Southern to PWI. Like the other parties, South-

ern opposes merger or closing of any state university, which it claims would be ineffective. And as with its position on selective admissions, Southern argues that merger is also a bad idea because it would destroy the important historical role of PBIs in educating disadvantaged blacks.

Other remedial suggestions from the Southern Supervisors relate to enhancement of PBIs, recruitment for other race students and monitoring of desegregation efforts. On the issue of enhancement, Southern argues that the State should provide increased funding to improve the quality of programs and facilities at the PBIs. Southern even suggests creating a number of new doctoral programs at SUBR, both to attract an integrated student body for USBR and to generate more black Ph.D. candidates who could go on to faculty and administrative positions at state universities. Southern's recruitment proposals include the use of biracial recruiting teams, increased financial aid and scholarships for other race students, and starting apprenticeship and college preparatory programs that would link PWIs with black high school students, breaking down barriers and encouraging more blacks to attend college.

On the issue of monitoring, Southern urges that a separate monitoring committee be set up to oversee the desegregation efforts of the current boards, which Southern views as continuing to exist. Ironically, however, the independent monitoring committee would, in Southern's view, itself be composed of representatives from the four other boards. This monitoring committee would have advisory boards at each campus and would have the power to sanction individuals and institutions for not meeting goals toward desegregation. On the other hand, Southern also suggests that incentives be provided (perhaps in the form of additional scholarships) to reward institutions for remarkable progress, and to encourage such progress elsewhere. An additional Southern monitoring proposal

would require the State to make annual reports to the Court concerning progress toward desegregation.

The remedial proposal of the Grambling Alumni is much more limited than the other parties' plans, focusing exclusively on the situation at Grambling. For instances, the Grambling Alumni take no position on the issue of creating a single state governing board. The Grambling Alumni also address selective admissions only at Grambling—opposing admissions requirements there—and propose programs transfers only between Grambling and Louisiana Tech.[3] Finally, the Grambling Alumni propose a number of ways in which the quality of academic programs and physical facilities at Grambling should be enhanced through the expenditure of additional state money.

IV. DISCUSSION, ANALYSIS AND FINDINGS

Introduction

The Master's assignment in this case is to take a broad view of the evidence and the history of this litigation and fashion a proposed remedy for consideration by the Court. The Court's instructions make it clear that the Master is bound neither by the plans submitted by the parties (which the Court found inadequate in any event) nor by the Court's own suggested remedies which have been outlined above. In other words, the Master is free to propose any remedy that is supported by the record and is consistent with his experience in higher educattion.

This challenge means that the widest possible consideration has been given to potential remedies, whether or not they were suggested by the parties or the Court. In making this inquiry the Master has, however, been guided by

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[3] Additionally, the Grambling Alumni suggest that some programs at other state universities in North Central Louisiana (*e.g.* Northeast, LSU-Shreveport) to be terminated so that Grambling would have exclusive offerings.

certain protocols of evaluation. First, it is essential that any proposed remedy be grounded in realistic assumptions about the way higher education works. Even after much study, orders issued from on high always risk failure when they have to be accepted at more remote operating levels. Therefore, proposed solutions must take into account the relationship between policy-making and implementation. For a remedy to succeed it must be internalized in the bureaucratic organizations themselves. This approach counsels that the parties' own suggestions and proposals should be carefully explored and utilized insofar as possible in shaping the final outcome. A second and related consideration is the fact that this Master's functions are part of a judicial process to end the racial identifiability of Louisiana higher education. Remedies proposed should be directed primarily to that end. Nonetheless, issues relating to quality and efficiency of education cannot be ignored. The goal is to produce successful students, black and white, who benefit from the opportunity to learn together atnd who, upon graduation, will help the state to prosper in the future.

The Merger Question

It is in this light that the Master analyzed the question of merger of institutions. Not surprisingly, none of the parties is in favor of this approach. Even if one party or institution could suggest merger for others in the system, there is a reluctance to do so because of the danger that ohhers would return the favor. Nonetheless, merger has been employed as a remedy in at least one state. *See Geier v. Blanton*, 427 F. Supp. 644 (M.D. Tenn. 1977), *aff'd*, *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir.), *cert. denied*, 444 U.S. 886 (1979) (merger of Tennessee State University and University of Tennessee at Nashville). And it has been suggested by non-parties as a solution to Louisiana's problem. (*See, e.g.*, Citizens Committee for Equity and Excellence in Louisiana Universities, November 7, 1988 letter to the Court (which

has been circulated to counsel).) The obvious candidates for merger are LSU A&M-SUBR in Baton Rouge, Grambling-Louisiana Tech in Ruston, UNO-SUNO in New Orleans, LSUS-SUSBO in Shreveport.

Several witnesses have testified as to the inappropriateness of merger as a desegregation solution. Wayne Brown, Dean of Business at Belmont College (at LSU witness) examined the Tennessee merger and argued that it was unsuccessful. (*See generally* Brown Witness Statement.) David A. Wise, Professor of Political Economy at Harvard's JFK School (also an LSU witness), sought to demonstrate that merger of schools where students' academic backgrounds are different will not be successful. (Wise Witness Statement, at 9-10; Wise Deposition, at 53-54.)

Merger of institutions is an extreme remedy that should be resorted to only if other remedies have failed. It has an appeal because planners can in one act combine proximate institutions with high white or black ratios into one racially balanced institution. But this kind of numbers game is often of short term benefit only. Institutions whose only commonality is in fact geographic proximity may not stay racially-balanced in the longer term. Faculty and administration are attracted to an institution because of its academic characteristics and mission orientation. Changing those dramatically upsets career choices and jeopardizes the professional relationships that make a school operate successfully. Merging institutions with student bodies of significantly different levels of preparation places the students and faculty in difficult relationships. While these difficulties may be worked out over time, merger remains a solution that poses considerable risks without any sure benefits for desegregation or improved education.[4] Therefore, the Master believes that

[4] There are some other situations in this case, however, where reorganization if not merger appears feasible. This holds true for

merger should be held in reserve as a desegregation solution, to be utilized only if after a trial period of five years the remedies proposed herein have failed to reduce substantially or eliminate the racial identifiability of Louisiana's public universities.

Moreover, the merger (or co-university) idea as applied to proximate universities in Louisiana would undermine historically black institutions with proud traditions and substantial followings. Grambling and SUBR have large alumni bodies and a tradition of minority education that emanates from the era of the dual school system itself. Grambling is a national university in that it draws over one-half its students from other states. Southern has appended to its plan an impressive list of SUBR alumni, many of whom have served in important positions throughout the nation. In higher education, alumni support and institutional loyalties matter greatly. What was first said about Dartmouth College by Daniel Webster applies to others as well: "It is sir, as I have said, a small college and yet there are those who love it." (4 Beveridge, *The Life of John Marshall*, 248-49 (1919).) PBIs can generate that kind of loyalty as well. Under the circumstances, an opportunity must be given for Grambling and Southern to make every effort to integrate before extreme solutions are considered. Therefore, the Master proposes that the merger remedy be kept on the shelf at this stage.

The Role of Predominantly Black Institutions

The special role of PBIs has been long recognized. It was discussed in the *Adams* litigation, *see Adams v. Bell*, 711 F.2d 161 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984), and has been mentioned in the remedial

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New Orleans and Shreveport and they will be discussed under the section relating to the proposed community college system in Louisiana (*see* pp. 82-91 *infra*).

guidelines promulgated by HEW which emphasize that a unitary system of higher education must not be accomplished by placing a disproportionate burden upon black students or institutions or by reducing educational opportunities available to blacks. *See* Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 43 Fed. Reg. 6658 (1978); Amended Criteria Specifying Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 42 Fed. Reg. 40,780 (1977).[5]

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[5] The Southern Supervisors argue that the HEW criteria were promulgated in accordance with the Administrative Procedure Act and have the full force and effect of law. Thus, Southern argues, the Special Master's remedial recommendation "must" be fashioned in compliance with the criteria. (*See* Southern Pre-Trial Memorandum, at 12-13; Post-Trial Memorandum, at 44.) Southern's argument is not well taken. First, the very court that ordered HEW to develop the criteria did not treat them as binding rules. *See Adams v. Bell*, 711 F.2d 161, 165-66 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1021 (1984) ("Thus, the point of his various court orders, as Judge Pratt explained, was not to specify what the final results of enforcement would be in every detail, *nor to decree unalterable requirements* for compliance with Title VI, but rather to have the Department initiate the process of enforcement, the process by which the specifics of compliance would then be determined.") (emphasis added). Second, as the State has pointed out, HEW itself admitted that the criteria were not promulgated in accordance with the rulemaking provisions of the APA and are not substantive regulations. (*See* Memorandum in Opposition to Respondents' Motion for Dismissal of the Administrative Proceedings, *In the Matter of the State of North Carolina*, HEW Docket No. 79-VI-1 (filed by HEW on Sept. 4, 1979), attached to State of Louisiana Post-Trial Memorandum ("Respondents argue that the criteria were not promulgated in conformance with APA requirements. We agree. Respondents argue that the criteria were not published in the *Federal Register* as a proposed rule. We agree. Respondents argue that the criteria are, therefore, not regulations. We agree. Nor were they intended to be.").) In the face of this record, Southern's reliance on a dissenting opinion in the *Adams* case is misplaced. (Southern Pre-Trial Memorandum, at 12-13;

While PBIs are of historical importance, it must also be recognized, as the State asserts, that the focus of this litigation is not institutions but students. (*See* State of Louisiana Post-Trial Memorandum, at 35-37; *United States v. Alabama*, 791 F.2d 1450, 1455-56 (11th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987) (state universities cannot assert fourteenth amendment rights against the state).) In 1988, 53 percent of Louisiana black entering freshmen were enrolled in PBIs and 47 percent in PWIs. (*See* Wharton Hearing Exhibit 6B, at 1-5.) This percentage of black students attending PBIs slightly exceeds that of 1981 when the consent decree began and was taken by the Court as an indication of the failure of the consent decree approach. Nevertheless, the opportunities for blacks in Louisiana higher education are clearly tied to the entire state higher education system. Any desegregation plan should seek to increase the number of Louisiana blacks who attend college, which is below the national average (Conrad Deposition, at 127), as well as to integrate the existing institutions, especially PBIs, whose percentage of other race students is below that of the PWIs. Over time, the challenge is to render the very terms PBI and PWI anachronistic.

The PBIs have developed attractive programs for black students which is reflected in the number of out-of-state black students they attract. But the State suggests that education of out-of-state students (white or black) should not be a priority of institutions in a state where the college-going and graduation rates of whites and blacks are so low. There is some merit in that position, especially if tuition levels are set so that in-state students subsidize out-of-state students. On the other hand, high out-of-state ratios are themselves indicative of the popularity and reputation the PBIs have earned.

Post-Trial Memorandum, at 44.) As a result, although the Master has reviewed the HEW criteria and considered them in developing his plan, he does not view them as rules binding in this case.

The more troubling implication is that the PBIs, while requesting additional money for enhancement, may be more intent on preserving their mission of serving black students than on expanding opportunities for white students. (*See* Spikes Witness Statement, at 29 ("white colleges are not capable of addressing the needs of black students"); Blake Deposition, Vol. II, at 5; Thomas Deposition, at 49-50; Allen Deposition, at 26.) The experience of the consent decree confirms that enhancement of PBIs without more simply makes PBIs more attractive to black students, without attracting white students. The focus of the Court's remedial plan, however, must be on improving the ability of PBIs to educate both black and white students. Preserving Southern and Grambling for their educational importance means preserving them as institutions for all Louisianians not just for black students.

A. *The Single Board*

Much of the evidence and testimony at the hearing before the Master, and in the Court's initial suggestions to the parties, has been directed at the creation of a single board to operate the public system of higher education in Louisiana. The state defendants including the Governor, the LSU System, the Board of Trustees and the Board of Regents all favor this concept even though it will result in a reduction or elimination of authority currently enjoyed by some of them. The Governor's 24-member Task Force proposed a single governance system to be known as the University of Louisiana Higher Education System.

On the other side of the single board question lies one of the defendants, Southern University Board of Supervisors. Southern's position is that the single board concept bears no necessary connection to desegregation. It cites examples of states where multiple or coordinating boards have done as well (or as poorly) as single board states in achieving desegregation and it emphasizes that

Louisiana's higher education governance arrangement was set in place by state constitutional enactment after this case began.

In the middle on the single board issue sits the United States.[6] The United States does not oppose the establishment of a single governing board so long as it operates on a desegregated basis. At the same time the United States maintains that the decision whether or not to create a single board should be for the state alone to make, not for the Court to order.

The critical inquiry on the single board question from the Master's perspective is whether its creation would increase integration of the public institutions—whether it would help to eliminate their racial identifiability. If that connection cannot be made from the record in this case, then the single board does not become a viable remedy no matter how much more efficient it may make higher education. However, this does not mean of course that desegregation and efficiency are mutually incompatible concepts. On the contrary, if a relationship between desegregation and efficient allocation of higher education resources can be shown, a stronger argument is presented. There can be no doubt that much of what needs to be accomplished to reduce racial identifiability will cost money. The efficient use of resources speaks to that concern as well as to the broader concern that all students, black and white, enjoy the highest quality education possible in the circumstances.

The various witnesses for the parties have discussed the pros and cons of the single board idea in great detail. Several witnesses submitted testimony on the importance of a single board towards the achievement of desegregation. Kerry Davidson, Joe D. Smith and James

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[6] The Grambling State University Alumni Association, which appears in this case as a litigating amicus, takes no position on the single board issue.

Wharton emphasized that the factionalism and rivalries produced by the present organizational structure make it difficult to concentrate attention upon the goals of either desegregation or efficiency. Governor Roemer testified that, by reducing bureaucracy and program duplication, funds will be freed up to enhance the operation of higher education and, presumably, to aid in the desegregation process. The state's witness, Roy McTarnaghan, Vice President for Academic Affairs at the University of Florida System, explicitly states that the single state board structure has facilitated desegregation in Florida. (McTarnaghan Witness Statement, at 8 ("Florida's success in implementing the [desegregation] plan was due primarily to a single board.").) McTarnaghan also testified in detail about the inefficiencies produced by what he identified as program duplication in Louisiana. (*Id.* at 15-18.) Eugene Trani, Vice President for Academic Affairs of the University of Wisconsin System testified that a single board is in the best position to address system-wide problems of a racially identifiable higher education system. (Trani Deposition, at 21-23.) Trani also identified a trend toward single governance structures in the states. (*Id.* at 34.)

This last point was contested by Southern University's witness, Marian Gade. Gade testified that there was a trend away from single board solutions to higher education organization. She also submitted a manuscript of a soon-to-be-published book entitled *The Guardians: Boards of Trustees of American Colleges and Universities* she coauthored with Clark Kerr. The Gade/Kerr book addresses generally the role of boards of trustees in higher education, providing factual background on how boards operate and noting advantages and disadvantages of various board structures. It provides a series of recommendations on such matters as board size, selection of board members and when board meetings should be open to the public. The burden of the Gade testimony was

that a centralized board leads to bureaucratization, top-heavy administration, and politicization of the governance process.

There was concern expressed by several witnesses about the potentially negative impact a single board might have upon historically black institutions and the students they educate. Larry Leslie, a witness offered by the United States, made the point that the Southern University Board of Supervisors protected that institution from the otherwise dominant voice of LSU as did the Board of Trustees for Grambling. The Task Force recommendations submitted by the State seek to blunt that concern by mandating that the racial makeup of the single board should reflect the percentage of blacks in Louisiana's population as a whole (Original State Plan, at 9). But the United States opposes any use of percentages on the grounds that they amount to racial quotas. (Amended United States Plan, at 9 n.4.) Another witness for the United States, Clifton Conrad, testified extensively on the State's Plan and came to the conclusion that the single board concept was no panacea for assuring desegregation in higher education. Conrad emphasized that what was needed to assure desegregation was a bureaucratic mechanism that had the "leverage" to assure that the desegregation plans got implemented (Conrad Deposition, at 85-87). In his view, this leverage might be better achieved through a court appointed monitoring team than a single board.

The organization of the single board was also addressed in the submissions. The State Task Force plan proposed a 17 member board (including a student member) with representation from each of the state's congressional districts. The Governor also emphasized the importance of geographical representation. The Task Force proposed that board members be appointed by the Governor and confirmed by the Senate. The Task Force plan also proposed that the single board have a full-time chief execu-

tive officer and staff, which would include a chief deputy with responsibility for desegregation matters. The board would have responsibility for all higher education budget matters, degree programs and the hiring and firing of campus chief executives. In addition the Task Force plan provided that each institution should have the opportunity to have local advisory boards of from 7 to 11 members who will be nominated by the head of the institution and appointed by the governing board. Its duties would be only those as were delegated by the board.

Its Potential for Success

In determining whether a single board can be utilized to improve integration of higher education in Louisiana, its potential must not be overstated. Admittedly, as several witnesses and parties have pointed out, the single board is no panacea. Segregation occurs in single board states and integration in multi-board or coordinated states. But panaceas are always in short supply. Just because the single board idea is no guarantee of success does not mean that it is not a step in that direction.

The value of the single board solution may well vary depending upon conditions existing in particular states at certain times. In Louisiana, at this time, the single board solution offers promise. For one thing, it is introduced against a background of higher education governance that is unusually complicated and divided. The present organization scheme in Louisiana—three operating and one coordinating board—almost guarantees a standoff between two "systems" (LSU and Southern) and the rest of higher education. Moreover, this arrangement has not succeeded in desegregating Louisiana's higher education, even though its creation postdates the Court's involvement in this case. Simply because the current board structure is the product of state constitutional choice does not make it the best arrangement to

achieve desegregation. The strongest argument of those favoring the present multi-board solution is that the structure of higher education in Louisiana is irrelevant to the goals of desegregation and therefore it ought not be changed. That is not an easy proposition to sustain.

McTarnaghan's testimony is convincing on the point that Louisiana's multi-board arrangement has led to unnecessary and costly program duplication.[7] Admittedly this testimony goes more to the question of efficiency than

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[7] McTarnaghan's Witness Statement provides the following chart illustrating program duplication in Louisiana as compared to Florida.

Chart 3

Comparison of Selected Bachelor's Degree Programs Offered and Degree Productivity: Florida and Louisiana Recent Five-Year Analysis

	Florida Programs Offered	Florida Average Degrees Per Yr.	Florida Degrees/ Programs Per Yr.	Louisiana Programs Offered	Louisiana Average Degrees Per Yr.	Louisiana Degrees/ Programs Per Yr.
Horticulture	2	29	14.6	6	12	2
Animal Science	2	57	28.5	10	84	8.4
Architecture	2	116	58	4	139	35
Journalism	3	178	59	9	91	10
Speech Correction	4	84	21	11	72	6.5
Business Education	6	67	11	13	72	5.5

Source: McTarnaghan Witness Statement, at 17-18.

the question of desegregation, but it shows that organizational structure can make a difference at least in that regard. Given the inevitable relationship between efficient use of program resources and the desire of students to attend institutions with attractive programs, it is sensible that efficient decisions might aid in desegregation as well. McTarnaghan believes that a single board structure was crucial to his state (Florida) achieving an improvement in desegregation of higher education. While that is a predictive judgment for Louisiana, it is certainly not in any way implausible.

Moreover, the conditions under which the judgment is offered must also be considered. The Governor of the state and three of its four boards (Southern in dissent) argue that it will work to achieve desegregation. That becomes a commitment to turn a structure, which in other circumstances might be policy-neutral, into an instrument of policy implementation. A specific mission to end racial indentifiability, embraced as such in its mandate, strengthens the case for the single board. It is persuasive evidence to the Master that most of the key participants who are needed to make desegregation work in this case are committed to this course of action.

The United States takes no position on the single board, but its witness Dr. Conrad's testimony is particularly relevant in this connection. While Conrad states that a single board concept by itself is no assurance of desegregation, he also concludes that an entity with sufficient power and clear vision, having what he calls "leverage", can achieve the desired policy outcome. (Conrad Deposition, at 85-87; Conrad Hearing Testimony, at 215-19.) Conrad talks in terms of this entity being a monitoring board appointed by the Court. But that option is dubious precisely because it removes those who must implement the plan from direct responsibility. There is no reason why the leverage function could not be undertaken by a single governing board if that entity is properly orga-

nized, instructed and supported. It is vastly superior to incorporate as much of the monitoring function as possible directly into the state organization rather than to leave it to an outside authority like the Court (or its appointees) which should be limited to an occasional (or even annual) reviewing function.[8] For the remedy to work, it must be internalized in the daily work of the state system.

The single board solution posits a relationship between efficiency and desegregation. McTarnaghan's testimony noted above emphasizes that program duplication seems to be a consequence of the multi-board structure in Louisiana. Program duplication is highly relevant to desegregation. As is more fully explained later in this recommendation, it is critical to the success of integrating the historically black institutions that they be upgraded and given desirable programs in order to attract significant number of white students. Only by creating an organizational structure with the power to make program decisions statewide can these efforts be achieved. Inefficiencies also suggest that dissipation of scarce resources for higher education which, given the difficult fiscal times Louisiana is facing, can only further impair the state's ability to enhance its historically black institutions.

Its Organization and Relation to PBIs

The main concern that arises from the single board solution has to do with the potential lack of protection such an organization will afford to Southern (and even Grambling) which according to testimony receive some measure of protection from the present multi-board structure. At the outset, it must be questioned why these schools, which level serious claims of mistreatment

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[8] Of course, this does not mean that there is no need for a monitoring function, just that it ought to serve a back-up role. That aspect of the recommendation is discussed at pp. 111-113 *infra*.

under the present system, are so much in favor of retaining it. It is true that Southern University has its own board; but that board must receive funds through allocation from the Board of Regents, a racially identifiable organization. Grambling has the Board of Trustees oversee its operations, which is also racially identifiable. The Southern Supervisors may provide some measure of political comfort but the limitations on its funding and program approval capacities are real. Moreover, given the fact that the Southern board is also racially identifiable in its membership, (14 black and 4 white members, *see* Beard Witness Statement Attachment A), it is not an obvious exponent of racial integration. It can never be forgotten that this case is about the integration of all of Louisiana's institution of higher education.

Of course, valid questions can arise if the proposed single board is configured so as to slight or ignore the valid educational needs of black or white students attending Southern and Grambling. The Task Force Plan approached this subject by recommending that the racial makeup of the single board approximate the percentage of blacks and whites in Louisiana's population. This would mean, for example, that on a 17 person board approximately five of its members would be black. Presumably a minority presence of this dimension would ensure a fair hearing for the concerns of Southern and Grambling. But that solution is opposed by the United States because it amounts, their counsel say, to a racial quota. Southern and Grambling have not responded to this approach at all.

The size as well as the racial makeup of a single board is also a matter of interest. Size can bear on effectiveness and effectiveness obviously relates to the leverage the single board must assert to achieve the desegregation remedy. If a board is too large its members will

lack the necessary involvement. On the other hand, if the board is too small it can be dominated by a few strong views. *See* Kerr and Gade, *The Guardians: Boards of Trustees of American Colleges and Universities* (forthcoming 1989) (where these factors are discussed and a minimum size board of 9 to 11 is recommended).

The three operating boards in Louisiana each have 18 members, broken down by race as follows: LSU Board of Supervisors (14 white/4 black); Southern University Board of Supervisors (4 white/14 black); Board of Trustees (13 white/5 black). The Board of Regents has 16 members (including one student), 3 of whom are black. Under the circumstances the size of the single board proposed by the Task Force of 17 members (including one student) seems reasonable from the point of view of effectiveness. The crucial question is the number of black members which at least for a period of transition under this new system might be appointed. The number of blacks assigned should exceed the percentage of blacks in the population of Louisiana for a limited period in order to ensure both a commitment to the desegregation remedy this court must decree, and an acceptance by the public of the determination to implement the decree.

Of course race alone does not ensure responsive action by board members. Hopefully all of the board members appointed, whether white and black, will be committed to improving the racial balance of Louisiana's public higher education. But for a transition period of five years the ratio of white to black should be adjusted to reflect the importance of the task ahead. A ratio of 10 whites to 7 blacks, excluding the non-voting student member whose racial make-up could change as he or she is replaced by another, is justified under the circumstances. Thus the new board would consist of 17 members appointed by the governor and confirmed by the senate, with one student member selected annually by the board.

Length of terms is also a matter of concern. Ideally the board members, while appointed as a product of the political process, should nonetheless be as free of politics as possible during the period of their service. To achieve this the terms should be staggered so as to extend beyond the term of a single governor and should be subject to reappointment. While the State placed emphasis upon the Governor's desire to achieve geographical representation (through each congressional district being represented), it is far more important to select individuals who have the background, experience and commitment to make the plan for racial integration work, wherever they are from. What is needed are individuals who believe in the need for racially integrated, quality higher education for Louisiana. Good people are always in short supply, but they must be found if this plan is to be implemented successfully.

The Legal Issues Surrounding Racial Quotas on the Board

It is difficult to understand the legal objections raised by the United States to the proposal for mandated minority representation on the new board. In situations where unconstitutional discrimination has been judicially determined, courts are free to craft remedial solutions that involve racial quotas. In *United States v. Paradise*, 480 U.S. 149 (1987), for instance, the Supreme Court approved a district court plan aimed at remedying past discrimination which mandated one-black-for-one-white promotions in the Alabama Department of Public Safety. *See also Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986) (approving a court-ordered remedial plan mandating a quota for nonwhite membership in a union). Moreover, in the recent case *City of Richmond v. Croson*, 109 S. Ct. 706, 729-30 (1989), the Court, while striking down a legislative affirmative action plan, reinforced the idea that narrowly-tailored race-conscious remedies are proper when supported by a finding of past unlawful

discrimination. In his *Croson* concurrence, Justice Scalia noted that "we have permitted federal courts to prescribe quite severe race-conscious remedies when confronted with egregious and persistent unlawful discrimination." 109 S. Ct. at 736. That is what we have here.

Certainly this case involves a previous finding of unlawful discrimination. Indeed, in its August summary judgment ruling, the District Court made explicit findings that: (1) there is a history of *de jure* segregation in the Louisiana state university system; (2) this *de jure* segregation is the cause of the current dual higher education system; and (3) the seven-year experiment under the consent decree has demonstrated that an effective remedy for the dual system will require "drastic" action. United States v. Louisiana, 692 F. Supp. 462-46, 653-58 (E.D. La. 1988). Under *Croson* and *Paradise*, these findings support the use of racial classifications here in order to eradicate the remnants of segregation.

A remedial plan fixing minority representation on the single board, like that proposed by the Task Force and endorsed by the State, is also narrowly tailored to serve the compelling interest in ending segregation. First, there is no effective race-neutral alternative. *See Croson*, 109 S. Ct. at 728; *Paradise*, 480 U.S. at 171 ("In determining whether race-conscious remedies are appropriate, we look to several factors including the efficacy of alternative remedies. . . ."). As discussed, the creation of a single governing board is a crucial step toward desegregation in this case and yet its efficacy is threatened unless the interests of the PBIs and black students can be institutionally protected by the new board, the majority of whose constituents will be PWIs and white students. No party has proposed or suggested, and the Special Master is not aware of, any race-neutral criteria that could guarantee the protection of black interests as

effectively as mandating a substantial black membership on the board.

Second, the plan for fixing minority representation on the board is flexible and can have a limited duration. *See Paradise*, 480 U.S. at 141 ("the flexibility and duration of relief, including the availability of waiver provision," is a factor to be considered). Like all the remedial provisions of this recommended plan, the composition of the board would be mandated by court order only until the unconstitutional dual system of higher education is eliminated. Moreover, the remedial plan contains an outside time limit (five years) for the minority quota of representation on the single board, after which further court action would be required to perpetuate the quota.

Finally, the proposal for a single governing board with mandated minority representation will not impose an unacceptable burden on third parties or the relevant labor market. *See Paradise*, 480 U.S. at 171 (also considering "the relationship of numerical goals to the relevant labor market" and "the impact of the relief on the rights of third parties"). As recommended by the Task Force, the single governing board would have 17 members with some slots reserved for minority members. And no one is currently employed by the yet-to-be created board whose job might be jeopardized by a minority quota. Especially in the context of the important remedial goals of this plan, the impact of the minority quota on individuals who might otherwise be appointed as board members is minimal and would not counsel against the use of quotas.

The LSU Supervisors have argued that any quota which produces overrepresentation of blacks on the single board is not narrowly tailored to the goal of eradicating the racially dual higher education system. (Amendments to Remedial Plan Requested by LSU Board of Supervisors, at 1-2; May 9, 1989 Hearing Transcript, at 15-21.) Relying on *Paradise*, the LSU Supervisors claim that

proportional representation might be an acceptable and narrowly tailored remedy, but that no case law supports disproportional representation." *Paradise*, however, belies that assertion. As discussed above, *Paradise* involved a distinctly disproportional one-black-for-one-white promotion scheme, which the Supreme Court approved. To be sure, the *Paradise* remedy was a temporary one, designed to *increase* the number of blacks in high ranking positions (where previously there had been none) but not to achieve permanent 50 percent black presence in high ranks. 480 U.S. at 163. Likewise, here, the goal is to increase other race attendance at historically single race colleges, toward a level proportional to the state's population; overrepresentation on the single board is a temporary remedial step narrowly tailored to achieve that goal, not a goal in and of itself. As such, it is supported by *Paradise*, not undermined by it.

In sum, the proposed single board structure with an interim quota for minority membership is a constitutionally valid means to help insure that the loss of a separate voice for the PBIs will not jeopardize the legitimate educational interests of the students they represent. There are, of course, other assurances that the single board will not work to the disadvantage of historically black institutions or concerns. The mission of the board itself would incorporate those concerns and its organization will ensure that they are addressed. Moreover, the continued oversight of a monitoring committee which is also proposed as part of the plan, will assist the board in remaining on a proper course of desegregation.

Campus Advisory Committees

The use of campus-based advisory committees will help to maintain channels of communication between institution and board. These advisory committees can also be organized in a race-conscious way. The use of advisory committees needs to be carefully evaluated. Assuming

each of the state's 13 four-year colleges and four community colleges were to propose them, it must be made clear what the limits of their powers are, lest they become instruments for disaggregating rather than centralizing the control of higher education. It also needs to be shown how these committees would relate to the goal of desegregating the system. Campus-wide advisory committees, properly balanced according to race, can be helpful in implementing any desegregation decisions issued by the single board. They are close to the place where implementation must occur. They can plan a positive political role in supporting and guiding the campuses towards the proper goals established by the board. Moreover, as early warning mechanisms, they can serve to alert the system officials about problems at the campus level.

Achieving racial balance on these advisory committees is relatively straightforward for the 11 predominantly white institutions. In those cases a percentage approximating the racial breakdown of the state's citizens can be employed. But when it comes to the historically black institutions, Southern and Grambling, the question is more complex. On the one hand, it is important to recognize the special role those schools have in educating black citizens long before those citizens were eligible to enter the state's white institutions. On the other hand, to maintain their advisory committees in a racially imbalanced way only serves to perpetuate racial stereotypes that make it more difficult to integrate those campuses. It would seem sensible, therefore, to retain for the next five years a majority of black representation on advisory committees in these two institutions, but ask a large minority of whites to serve on them as well. In its comments on the Recommended Remerial Plan, Southern has requested that, assuming there are an odd number of members on the advisory committee at a PBI, the number of black members could exceed by one the number of white mem-

bers. (Southern Response to the Special Master's Recommended Remedial Plan, at 8.) That seems a reasonable solution, at least for the next five years. The racial composition of the advisory committees will have to be revisited by the board and the monitoring committee after that time.

B. *Classification of Institutions and Selective Admissions Standards*

The Task Force in its report adopted by the State discussed reclassifying the public institutions based on mission and the Court in its suggested remedies mentioned the institution of higher admissions requirements. These remedies are related and will be discussed together, although it is possible to separate them in the sense that research or doctoral institutions can be open rather than selective admission institutions.[9]

The crucial issue regarding these remedies remains their relationship to the goal of integrating Louisiana higher education. In terms of classification (sometimes called "tiering") there is less contention over—and less evidence about—its relationship to desegregation. Nonetheless, organizing institutions hierarchically by degree and program offerings has several obvious advantages for resource allocation and quality control that can bear on desegregation goals.

LSU A&M as a Flagship Institution

The State/Task Force Plan urges "flagship" status for LSU. That status is not contested by any of the plans or other submissions by the parties. Several witnesses support this idea. William E. Davis, chancellor of the Ore-

[9] Dr. Conrad indicated that some large state universities, such as the University of Kansas, have undertaken substantial graduate and research programs while retaining open admissions. (Hearing Testimony, at 214-15.) That course of action will not be recommended here as is more fully explained at pp. 64-66 *infra*.

gon State Higher Education System (an LSU witness), stresses the importance of a major research institution in the state university system and says that only LSU has the potential to fill that need (Davis Witness Statement, at 1-12). Marian Gade (a Southern witness) confirms that need for every state to have a premier research institution (Gade Deposition, at 151-52). Other witnesses close to LSU, and therefore more interested in the outcome, also testify to the need to preserve or implement LSU's flagship status.[10]

The relationship between classifying or tiering public institutions and the desired goal of desegregation is an inferential one. There is no obvious and necessary connection between organization and desegregation. Thus how state universities are organized can be viewed as an educational matter not rising to constitutional levels. However, there is much to be said for structuring higher education to enhance quality and then ensuring that minority students participate at all levels of the system. A system which produces better educated students will benefit all concerned. As the Court noted in this case: "The interaction of the better minds, the exchange of various thoughts and aspirations, and the contacts made at college are factors to be considered, for these benefits carry over to the business world. In other words, there is something to the old boy network." 692 F. Supp. at 657.

Certainly LSU qualifies as Louisiana's network in that regard and so long as black students are adequately represented (a subject to be discussed later) the creation of a flagship institution can be a positive force for campus

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[10] *See generally* Bogue Witness Statement, at 2-3. LSU has also submitted witness statements from numerous LSU faculty and administrators testifying to the high quality of programs and facilities at LSU. *See* Witness Statements of Carpenter (architecture); Hay (computer information systems); Henry (business administration); Hogan (libraries); Kraft (computer science); McLaughlin (engineering); Midgely (social work); and Smith (education).

and, as important, societal integration. Students, graduate and undergraduate, who attend that institution must ultimately compete together for positions in the world of business and commerce. Interracial friendships formed there will persist beyond the classroom. Quality graduate programs and research endeavors open to all are in the state's interest and therefore in the interests of this Court and the United States.

There is another reason why flagship status for LSU makes sense. It allows the state to rationalize the missions of all of its four year (and even two year) institutions. To be placed at the top of a pyramid implies a middle and a bottom.[11] Establishing a hierarchy of schools in other words aids all of them to define their missions and to gain public acceptance. The Plans suggest a second tier of institutions to follow LSU's "research" status. These are labelled "doctoral" institutions according to generally accepted national classification schemes (*see* Original State Plan, at 12-14 (discussing classification systems of the Carnegie Commission and the Southern Regional Education Board)). The State/Task Force Plan lists UNO, USL and Louisiana Tech in this category and possibly Southern-Baton Rouge, assuming that institution can reconcile doctoral status to its open admissions role or is willing to change that role. (*Id.* at 16.) The Southern University Plan includes its Baton Rouge campus along with the other three within the doctoral category also. (Amended Southern Plan, at Attachment N.)

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[11] The use of the pyramid analogy is not without difficulty since it may be taken to imply a quality as well as a mission differentiation measure. What is intended here is to refer to missions alone in the hierarchical sense, but not to imply a quality judgment about those missions. In other words a school with only a four-year undergraduate mission (or even one with a two-year mission) may do as good or even a better job of educating undergraduates than a research or doctoral university. This has long been true in the private sector, where small colleges traditionally produce graduates of high quality.

There is no disagreement among the parties about this step either. The need for this second tier is made clear from the organization plan itself. It is critical for the state to limit those institutions where doctoral level work is to be undertaken in order to organize resources, faculty and programs in an efficient way.

SUBR as a Doctoral Institution

From a desegregation perspective, it is imperative that SUBR be included among the four doctoral institutions. In order to reduce and ultimately eliminate its racial identifiability, SUBR must have and be viewed as having a valuable educational mission. Thus the points made by the Southern Plan about the need for doctoral level programs for the Baton Rouge campus are well taken. (Amended Southern Plan, at 26, 52.) However, with new status goes new responsibility. As is discussed in the section on admissions standards, SUBR cannot easily have its open admissions role and become at the same time a true doctoral institution. In order to attract white students, SUBR must be perceived to be equal educationally to the other doctoral institutions. This is true not just for undergraduate students but for graduate students as well. Quality programs are to be expected of doctoral institutions. They must survive rigorous peer review and accreditation standards to be permitted to award higher degrees. Once this status is achieved and recognized, it becomes one of the best techniques for eliminating the racial identifiability of SUBR. Perceptions of quality will offset and overcome perceptions based on race if given a chance. A student's self interest is one of the best forces for combatting his or her racial prejudices.

There is another reason why SUBR as a doctoral institution, and indeed why the tiering concept in general, is pro-desegregation. Many black students should take doctoral level training. The need to produce black faculty is a critical aspect of the desegregation process. By

"growing their own", a concept introduced in Wisconsin according to the testimony of Dr. Trani (Trani Witness Statement, at 17), a state can help overcome the dearth of black Ph.D. and doctoral candidates in higher education. By organizing itself to maximize quality graduate education, Louisiana will be better situated to take advantage of this opportunity. SUBR has a vital role to play in this process.

The remaining four-year institutions are labelled "comprehensive" by the State/Task Force Plan.[12] As a rule these institutions should not offer doctoral programs.[13] They are: Grambling, LSU-S, McNeese, Northeast, Northwest, Nicholls, Southeast, and SUNO. While the Southern Plan proposes further tiering among these in-

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[12] The State/Task Force plan also identifies a category of professional institutions: the LSU Agricultural Center, the LSU Medical Center and the LSU (Paul M. Herbert) and Southern Law Centers. These institutions are organized in conjunction with the universities to which they relate and are expected to have appropriately designated missions and admissions standards.

[13] Several institutions that would be classified as comprehensive universities currently offer discrete doctoral degree programs. For instance, Grambling offers a doctoral degree in developmental education, Northeast offers a Ph. D. in Pharmaceutical Science and SUNO offers a Ph.D. and Ed.D. in Special Education. Grambling and Northeast have been especially vocal in arguing that these programs be maintained notwithstanding any reclassification or clarification of their school's mission. (*See, e.g.*, Proposed Amendments to Recommended Remedial Plan from the Grambling Alumni, at 1-4; State of Louisiana Suggested Amendments to Recommended Remedial Plan, at 3.) Such programs, like all others, must be studied by the board; however, so long as they are educationally sound and consistent with the desegregation goals of this plan, discrete doctoral programs need not be eliminated solely to conform to the school's new categorization.

Northeast has also requested to be considered by the board for status as a doctoral institution more generally. The board should study the offerings of doctoral and non-doctoral institutions as well as the demand for doctoral programs to determine if additional universities such as Northeast should be categorized as doctoral universities.

stitutions, there seems to be general agreement by the parties with their missions as they now stand. The board and President should explore the necessity for further tiering among these schools in due course, having in mind resource constraints as well as racial balance issues. The very purpose of tiering is to reduce duplication, not to encourage it. (See Chart 3 *supra.*)

The Relationship of Admissions Standards to Tiering and Desegregation

The assumption underlying the State Plan is that the institutional hierarchy created in terms of graduate program offerings will carry over to selectivity in undergraduate admissions. For example, LSU admissions would be limited to the top 25 percent of Louisiana high school graduates (as determined by high school class rank, grade point average, college preparatory course work and minimum ACT scorces) and the doctoral institutions would be limited to the top 50 percent. The comprehensives would be either less selective or open admissions.

The question of admissions standards cannot be understood without recognizing the current situation. In theory, all of Louisiana's higher education is currently on an open admissions basis. Louisiana high school graduates are free to enter the institution of their choice.[14] But LSU has recently embarked upon a modest selectivity program which has served to limit its admissions. The LSU experience is central to the analysis of the relationship between admission standards and desegregation.

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[14] In practice, however, since some institutions are more popular than others, one would think that the chances of gaining admission might vary considerably in any given year. But the State assures the Master that, in the last five years, application rates and acceptance rates have been identical for Louisiana's four-year institutions.

Former LSU Chancellor Wharton in his testimony at trial discussed how LSU decided to require a college preparatory curriculum for the first time in 1988 after alerting high schools to the changes four years earlier. As a result its entering class was reduced from 4500 to 3700 students. But those students were better prepared for college work. Indeed Wharton testified that the high school curriculum completed by those 3700 entering students had been completed by only *one* entering LSU student five years earlier. (Wharton Deposition, at 97-98.) That is eloquent testimony to the value of demanding more from the high schools. Moreover, average Act scores for entering students at LSU in 1988 were uniformly and significantly higher: overall ACT scores averaged 21.3, up from 19.6 in 1981, and average scores for black students were 18.0, up from 13.2 in 1981. (Hargrave Witness Statement, at 22-23.)

Thus the importance of relatively modest admissions standards (coursework requirements but no rank in class or ACT minimum) served to produce better prepared applicants for admission. It in effect forced the high schools to respond to the preparation challenge. And more importantly the number of black students entering LSU was not lessened; Board of Regents data show that 8.2 percent of the 1988 entering class was black, which actually marks a small increase over the historical percentage of black students at LSU. (*Compare* Wharton Hearing Exhibit 6B *with* Chart 1 *supra.*)

The current practice of open admissions to all four-year institutions is counter-productive, both in terms of educational objectives and racial integration. The objective is not simply to admit students into college, but to educate and graduate them. In terms of undergraduate degree productivity, the Louisiana open admissions system is a failure. Dr. Tremblay, Coordinator of Research and Data Analysis, Board of Regents, submitted a chart which analyzed the status of students after six years who

entered as freshmen in fall 1982. Systemwide only 33.2 percent of the 21,470 students who entered higher education in 1982 had received bachelors and associates degrees after six years of attendance. This is far below the national average of 44.9% for public universities. (American Council on Education, Digest of Education Statistics, at 249 (1988) (percentage of students entering in 1980 who graduated within the following six years).)

But Tremblay's data also show wide variance among institutions. In referring to the Tremblay data (which are reproduced as Chart 2 *supra*) certain conclusions can be drawn. The open admissions system is just that. Students enter higher education (both four and two years) easily but do not readily leave with degrees. Moreover, that impact is particularly acute at institutions that have a large black population, notably SUNO. According to Tremblay only 8.5 percent of 1982 SUNO freshmen graduated after six years. While Dr. Spikes on behalf of the Southern Supervisors introduced figures to challenge Tremblay's statistics, even under her figures the total for the same entering class did not exceed 12 percent in 1988-1989. (Spikes Hearing Exhibit 1.)[15] Admittedly, as Dr. Spikes explained, the economic circumstances of SUNO students makes them susceptible to part time and occasional attendance (Spikes Hearing Testimony, at 260-62). But the fact remains that unlike Grambling (which has a graduation rate of 42.6 percent) or even SUBR (25.3 percent), SUNO is unproductive as a four-year degree institution. Moreover, Southern's own witness, Dr. Blake, testified that:

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[15] In a post-hearing motion to strike, the Board of Regents challenged the statistical validity of the Southern submission. Although the Board of Regents makes some good points, it is unnecessary to resolve the question here because the statistical differences are not significant enough to undermine the essential point.

> A good graduation rate four years [after entering] would be around 30 percent, about one-out-of-three four years later; then five years later it should go up to over 40 percent; and over a six-year period, it should top out at about 55 percent. Those would be respectable figures in terms of the varieties of attrition studies that I have seen. (Blake Deposition, Vol. II, at 49.)

It is difficult to escape the conclusion on the data presented that SUNO is in effect a four-year college in name only.

But even LSU-A&M which admits the strongest students overall on an open admissions basis [16] does not have impressive productivity results. Only 44.9 percent of its students who entered in 1982 had taken degrees after six years. Thus the leading institution in the state failed to graduate one half of its students. Although this graduation rate corresponds to the national average for *all* public universities (*see* p. 73 *supra*), it is below what one would expect for a "flagship" school.

In a state where almost 50 percent of the entering four-year students need remedial (developmental) education,[17] it is not likely that degree productivity will be

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[16] Wharton's testimony contains charts that show LSU to have the highest GPA's and ACT scores among high school students entering Louisiana public higher education. (Wharton Hearing Exhibit 6A.)

[17] *See* Tremblay Hearing Exhibit 2, which shows that 48 percent of fall 1988 four-year college students needed developmental education. The figure was 77 percent for black students. Interestingly the percentage of those needing developmental education was also 48 percent for students at two-year colleges, suggesting that four-year schools provide as much if not more remedial education that two-year schools. This also points to a hidden cost of the open admissions system which fails to organize students by academic ability. It creates programmatic inefficiencies since all of higher education must devote resources to developmental education.

high. But the question is whether making some institutions more selective will have a positive effect on this situation. Getting students ready for college is the job of high schools and the more colleges demand of students who enter, the more the high schools will deliver. Drs. Trani, McTarnaghan and Wharton, all State witnesses, testified that state universities have an important role to play in setting the curriculum of high schools. (Trani Deposition, at 29; McTarnaghan Deposition, at 33-34, 80-81; McTarnaghan Hearing Testimony, at 21-24, 28-30; Wharton Hearing Testimony, at 189-93.) But Dr. Gary Orfield, a Southern witness, maintained that the high schools cannot respond if the framework and resources are not in place. (Orfield Deposition, at 25-30.) Dr. Wharton's trial testimony confirms the potential colleges have to have to reform high school curricula.

If LSU becomes selective its degree productivity rate should rise considerably. Truly selective public institutions nationally graduate around 75 to 80 percent of the students in *five* years. It might be thought that LSU's selectivity would only serve to concentrate the good students who are currently spread around the system into one institution thereby lowering every other institution's degree productivity levels.

But that need not follow. If the four proposed doctoral institutions also implement selective admissions standards as the State plan suggests (in SUBR's case over time) that will place further demands on students to perform well in high school in order to enter those schools. Evidence also shows that students rise to challenges. This has been the experience in Florida according to the testimony of Dr. McTarnaghan, a State witness. The more the Florida system demanded of high school graduates, the more the high schools delivered. The result has been a significant increase in SAT scores over a five-year period at no reduction in minority enrollment. (McTarnaghan Hearing Testimony, at 21-

23, 28-29.) Moreover if the other "comprehensive" institutions remain open to those who have passed the proper core curriculum, without regard to their class rank and ACT averages, then there will be little loss of access to higher education at a real gain in preparation and degree attainment.

The Racial Impact of Selectivity Techniques

The impact of selective admissions on black students—and hence on the desegregation remedy the Court must shape—remains problematic. If the selectivity index is driven by ACT scores then black students will appear in significantly smaller numbers in selective institutions like LSU. (Wise Witness Statement, at 15-24.)[18] However, if the selection index is based primarily on high school grades, courses and rank in class the differences can be ameliorated. While no statewide data on rank in class by race are available, based on the racial composition of many public school districts it is logical to conclude that many black students will be in the upper ranks of their respective high school classes.

Similarly, there is no reason why these same high schools cannot add the courses necessary to prepare students for college. Since the strict use of ACT scores would tend to reduce the number of blacks who would gain admission to selective institutions, the ACT should be used in a way that will produce the least negative impact upon black enrollment. The useful data contained in the ACT can be employed in a more positive rather than negative fashion. Students with high ACT scores (black or white) should be able to use them to some extent to offset lower class rank of GPA perform-

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[18] Wharton's data show the average ACT score in 1987-1988 among whites to be 18.6 and blacks to be 12.7. The high school grade point averages for whites in 1987-1988 was 2.8 and for blacks 2.54. (*See* p. 20 *supra.*)

ance (with college preparatory courses still being required), but minimum ACT scores should not be required of all students.

In this fashion the ACT's impact on the desegregation goal can be minimized without eliminating it as a tool of admissisons analysis. The requirement for college preparatory courses should be established through a dialogue between the universities, the Board of Elementary and Secondary Education and the public high schools. As the experience at LSU shows, if such requirements are phased in over time students can be expected to take a more demanding course load in preparation for attendance at newly selective institutions.

Even under these circumstances the presence of blacks may be reduced in the selective institutions. For this reason, the State Plan introduces the notion of exceptions to the usual admissions requirements for a certain percentage of entering students. The State Plan presumes exceptions of ten percent, if necessary, to attract other race students, five percent for "institutional interests" and an unspecified percentage for student athletes. All selective institutions face the challenge of accommodating some students whose scores on objective tests or class rank do not measure up to the rest of the class. Whether it is alumni children, students of special talents (including athletes), students of influential and/or generous citizens, or minority students, exceptions are made nationwide. *See generally Regents of University of California v. Bakke*, 438 U.S. 265, 316-25 (1978) (Opinion of Powell, J.).

Certainly Louisiana's newly selective institutions need not be any different. As a matter of remedy, however, it is critical that blacks (or whites in the case of SUBR) be given consideration in this process. There is little need to worry that such exceptions will be made with regard to race in athletic admissions; but exceptions should

also be made in terms of minority students more generally. The United States and its witness Conrad maintain that any such exception should be "race neutral" (Amended United States Plan, at 11; Conrad Hearing Testimony, at 211-13). It is difficult to understand what is meant by that phrase if the goal is to create a racially diverse student body. Thus, for legal reasons expounded upon in more detail in the discussion of minority participation on the single board (pp. 56-51 *supra*), the exceptional category of ten percent of minority students is justified.[19] This does not mean of course automatic admissions for minority students of up to that percentage. Their high school records and test scores will also be relevant to determining whether they have a likelihood of success at the institutions they choose. The important point is that, if this does occur, the percentage of black students at LSU would exceed current levels at the same

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[19] Like the minority quota for the single board, the ten percent admissions exception for minority students is narrowly tailored to serve the compelling interest in eradicating Louisiana's racially dual higher education system. Although the United States has suggested a race-neutral admissions exception, it has not explained how such an exception would operate and no party has explained how a race-neutral exception would serve the overriding goal here: increasing the number of other race students at the PBIs and PWIs. The Master is convinced that only a race-*conscious* remedy can achieve that goal. Moreover, the admissions exception would, by it nature, be flexible and have a limited duration. Even with a mandated ten percent set-aside, the single governing board and individual institutions would have wide latitude in determining how the admissions standards would be structured in general, how the standards would be waived or altered for minority students, and which students would be selected under the exception. The admissions exception would also be used only until each university achieves a constitutionally-acceptable level of other race enrollment. This flexibility, combined with the compelling purpose underlying the admissions exceptions, more than justifies the minimal impact the exceptions would have on students denied admission but who, in any event, could inevitably be accommodated at another state university.

time the institution moves in a more selective direction. That is the optimum solution.

This category of exceptions may also require some remedial or developmental education at the selective institutions. While they will generally be out of that business due to their selectivity, there may be more need for that effort to continue on a more focused basis. As a general proposition, however, developmental education should become a priority of the community colleges, whose role will have to be expanded in light of the tiering concept that the plans recommend.

To make a tiered system of higher education work, many centralized decisions must be made. This ties the single board recommendation closely to the tiering and admissions standards recommendation. Witnesses have emphasized the need for enrollment management since one cannot know in advance precisely what changing roles and standards will do to the student profile or existing institutions. Dr. Conrad supports the use of enrollment ceilings both to ensure program quality and desegregation (Conrad Witness Statement, at 34; Conrad Deposition, at 46-52). Dr. Trani also emphasizes the importance of enrollment management (Trani Deposition, at 171) and Dr. Richardson notes favorably the California system where qualified students are assigned by the system to particular institutions (Richardson Deposition, at 24-25).

Some of these issues will be addressed here (especially the issue of duplication and enrollment management) but no precise answers can be given at this stage of the process. Creating a new system requires that the system itself make some of these crucial choices.

C. *The Role of a Community College System*

As part of the tiering proposal, the State Plan endorses the creation of a community college system to insure an outlet for open admissions into college. The Court also

recommended consideration of the concept of a community college system. Louisiana has never embraced community colleges as an integral part of its higher education system and as a result its community colleges are relatively undeveloped as an educational resource. (*See* Witness Statement of Bill J. Priest, chancellor Emeritus of Dallas County Community College, an LSU witness, at 7-8.) Louisiana ranks 48th among states in the number of higher education institutions in relation to college age population largely because of the paucity of community colleges. Moreover, community colleges serve a non-traditional age population which is largely unserved in Louisiana, even though it has a very low high school completion rate which accentuates the need for lifelong learning. (*See* Trustees' Post Trial Memorandum, at 3.)

There are four community colleges that are defendants in this case: Delgado (New Orleans); LSU-Eunice; LSU-Alexandria; and Southern-Shreveport. Their total enrollment is about 12,000 students of whom about 3,800 or 32 percent are black. In addition Bossier Parish Community College and St. Bernard Parish Community College are under the aegis of the Board of Elementary and Secondary Education.[20]

The State Plan calls for the establishment of a community college system to be governed by the single board (Original State Plan at 17-19). Southern makes no recommendation with regard to the system idea but does favor a merger of SUNO and Delgado. This approach is

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[20] The Bossier Parish and St. Barnard Parish Community Colleges have been granted summary judgment by the Court from this case. *See* 692 F. Supp. at 658. The future of those institutions and the Orleans Regional Vo-tech School must be determined by any newly created community college system. It would, of course, be advantageous to incorporate those schools into the new unitary and comprehensive community college system.

also supported by other witnesses.[21] The need for a systemic approach to community colleges stems from the tiering concept. Community colleges are necessary to insure remedial education of those who might be excluded from the less accessible four-year college system. (Wise Deposition, at 55-56.) Moreover, the creation of a community college system ensures a system that is racially balanced. (Parnell Deposition, at 22.) The system created from among the existing independent community colleges would have had 12,351 students in 1988, of whom 31 percent were black.

The Dumping Ground Charge

But the racial balance of community colleges can also be viewed as a weakness. Several witnesses (Dr. Orfield and Conrad) argue that community colleges are dumping grounds for black students who do not transfer into four-year institutions. (Orfield Witness Statement, at 2-4; Orfield Deposition, at 35-37; Conrad Deposition, at 261-65.) This view of community colleges is sharply contested by Drs. Davis and Caillier (the head of Delgado). Dr. Caillier argued that community colleges more closely match the racial make-up of the surrounding population than do four-year colleges and that establishing a statewide community college system would "significantly increase" the number of students attending college. (Caillier Hearing Testimony, at 72-73.) Dr. Parnell testified that, of those students entering community colleges with the intent of transferring, 80 to 85 percent actually do so. (Parnell Deposition, at 22-23.)

To overcome the reality and perception of the dumping ground allegation, the transfer function of commu-

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[21] Terrel and Blake, Southern witnesses, and Beard for the Regents, all support putting Delgado under the supervision of SUNO. (Terrel Deposition, at 90; Blake Witness Statement, at 3-4; Beard Deposition, at 57.) Dr. Leslie opposes this idea. (Leslie Witness Statement, at 19; Deposition, at 120.)

nity colleges must be emphasized. Drs. Leslie and McTarnaghan discuss the success that Florida has had in using community colleges as transfer institutions. They claim that the existence of community colleges has aided desegregation at the four-year institutions. In effect the community colleges are able to prepare students for a more rigorous four-year experience. Carefully drawn articulation agreements must exist between the community colleges and four-year institutions to ensure that the transfer possibilities become a reality. It is the task of the new system to establish these agreements.

Ideally, as Parnell has stated, in states (like Maryland) where there is a well-developed community college system a greater percentage of people attend college and obtain degrees. Parnell Deposition, at 7-18.) Moreover, the mission of community colleges extends beyond the production of two-year college degree recipients (the transfer function); as Dr. Caillier testified, community colleges are also designed to offer occupational and technical education opportunities. (Caillier Hearing Testimony, at 79-80.) In some respects, these opportunities are as important to the community colleges as the transfer function. Jobs in the economy of Louisiana require skills that community colleges are often in the best position to provide. Articulation agreements between business and industry and the community colleges may be as important to the state to create as those between the community colleges and universities. Qualifying people to hold jobs is a major function of community colleges and the mission orientation of community colleges can, therefore, have a positive effect upon minority employment opportunities beyond the production of transfer eligible graduates.

The Need for New Campuses

To establish a system of community colleges implies access in all parts of the state. The witnesses have dis-

cussed certain areas where gaps exist, notably Baton Rouge.[22] While no statewide system of community colleges can ignore the Baton Rouge area, especially if the four-year institutions there restrict their admissions, the creation of any new community colleges can be left for future determination.

The present task is to organize those community colleges that already exist into a coherent system. Initially, this requires a review of all two-year programs that are part of four-year institutions. In general, such programs should be coordinated with or even absorbed into the community college system. At oral argument concerning the Special Master's original Recommended Remedial Plan, however, counsel for the Board of Trustees argued that certain two-year offerings by four-year institutions are not appropriate for inclusion within the community college system. (May 9, 1989 Hearing Transcript, at 23-25.) For instance, Louisiana Tech offers two-year courses under contract with Barksdale Air Force Base—courses that could also be provided by an out-of-state university of the Air Force's choosing. (*See generally* Witness Statement of David Grindstaff.) Northwestern offers an associate degree in nursing—a degree that could not easily be combined with the offerings of the proximate community college, SUSBO, because SUSBO does not have a nursing program. With respect to these programs, the best course is for the new board to conduct its own review to determine if the courses should be incorporated into the community college system. To guide the board in this endeavor, it should be noted that, so long as the programs are adequately supported, serve

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[22] Dr. Wharton, for example, supports the creation of a community college in Baton Rouge, based on the model of the community college in Tallahassee, Florida, where both a PBI (Florida A&M) and a PWI (Florida State) exist. (Wharton Deposition, at 100-01.)

the educational needs of their community and do not undermine the coordinated community college system, discrete existing two year programs may be retained at otherwise four-year institutions.

SUNO is a special case in this regard. It offers seven two-year degrees in addition to its four-year B.A. program. These degrees according to Dr. Spikes are currently underutilized or even inactive.[23] Some witnesses have also testified as to the inappropriateness generally of including two-year programs within four-year institutions, due to the different objectives of the faculty and students. (*See, e.g.*, Conrad Hearing Testimony, at 203-07.) Based, apparently, on these considerations, the parties are in rare agreement that the two-year programs at SUNO should be discontinued. The State has proposed that SUNO become a four-year comprehensive university. (Original State Plan, at 20.) The Board of Trustees, on behalf of Delgado, has argued that Delgado should be *the* community college in New Orleans, operating in conjunction with the offerings of Orleans Regional Vo-Tech and St. Bernard Parish Community College but not SUNO. (Trustees Post-Trial Memorandum, at 5.) The United States and the Southern Supervisors say that SUNO should be "enhanced" to four-year status and its two-year programs transferred to Delgado. (United States Response to the Special Master's Recommended Remedial Plan, at 16; Southern Response to the Special Master's Recommended Remedial Plan, at 12.)

The Special Master has some trepidation in reclassifying SUNO, with its extraordinarily low productivity

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[23] The Board of Trustees Post Trial Memorandum notes that SUNO produced 132 graduates from its seven two-year programs over the last six years while Delgado produced 3905 graduates from its 49 associate degree programs. (Trustees Post-Trial Memorandum, at 4-5.)

(*see* discussion at pp. 73-74 *supra*), as a four-year liberal arts university. Nevertheless, it is apparent that SUNO's two-year role has been no more successful than its four-year mission. Moreover, SUNO's two-year offerings overlap with Delgado's whereas SUNO will be the only open admissions four-year university in New Orleans, once UNO adopts selective admissions. There is the hope that creating this new niche for SUNO will, if the reorientation is conscientiously pursued by the board and the SUNO administration, lead to improved degree productivity. The board should, therefore, review SUNO's two-year degree offerings and either terminate them or transfer them to Delgado.

Organization of the System

The head of the system of community colleges (who might be called a system vice-president for community colleges) would report directly to the president of the University of Louisiana System. While the exact title of the new system should be left to the board to resolve,[24] it might be designated the Louisiana Southern Community College System (LSCCS), with each campus simply adopting its geographic location (*i.e.*, LSCC-A, LSCC-E, LSCC-S). Provisions might be made to retain Delgado's name (*i.e.*, LSCC-Delgado). The system vice-president

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[24] This report uses various names and titles, including "University of Louisiana System" as suggested by the State Task Force, for individuals and institutions within the reorganized system of public higher education. By and large, such titles are not vital to the desegregation remedy proposed herein; the titles are thus suggested and the new governing board should be free to craft different titles as it chooses. An important caveat is, however, in order: titles selected must be consistent with the remedial goals of this plan and thus should reflect a reorganized and *unified* system of public higher education. It would not be proper, for example, to call the new system the "Louisiana State University System," implying that the existing LSU System had survived and that other institutions had been placed under its control.

for community colleges would name, with board approval, each of the community college campus chancellors. Since this vice-president would report to the president of the system, the community college system would tie into the university system and its goals and mission would be clearly articulated within that larger framework.

The new system of higher education absorbs each of the former institutions, whether two-year or four-year, on an equal basis. Although LSU A&M and SUBR retain some distinction within this new system because of their historic land grant status (and because of LSU's flagship status), they are no longer "systems." Nonetheless, they are the only two institutions which have formerly separate graduate and professional schools reporting to them. This is done for ease of organization only. Under the new organization scheme, only the community colleges may be said to be a "system" within *the* system.

The vice-president for desegregation compliance reports to the president but also has direct access to the campus units (a "dotted line" relationship). This is to insure that the special status and role of that officer in the organization is properly understood and implemented.

It is now possible to present the new system of higher education in terms of a rudimentary organization chart.

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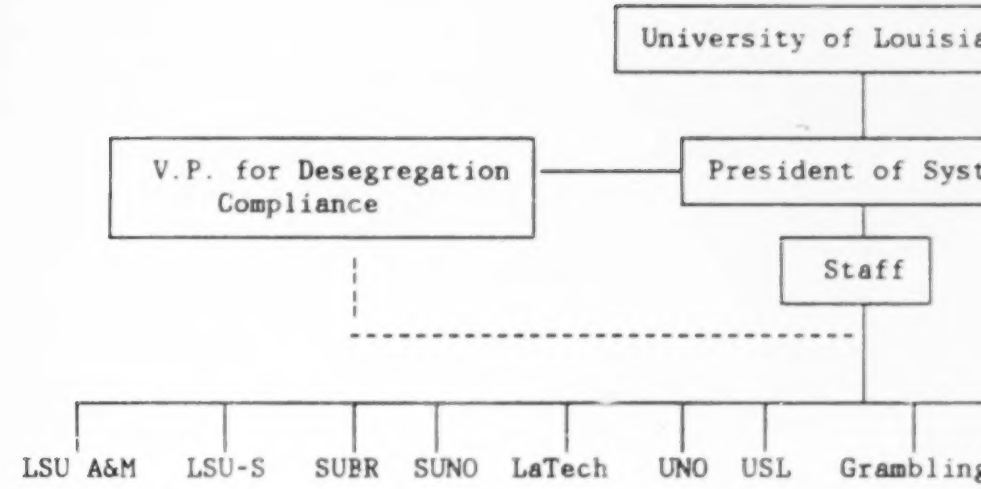

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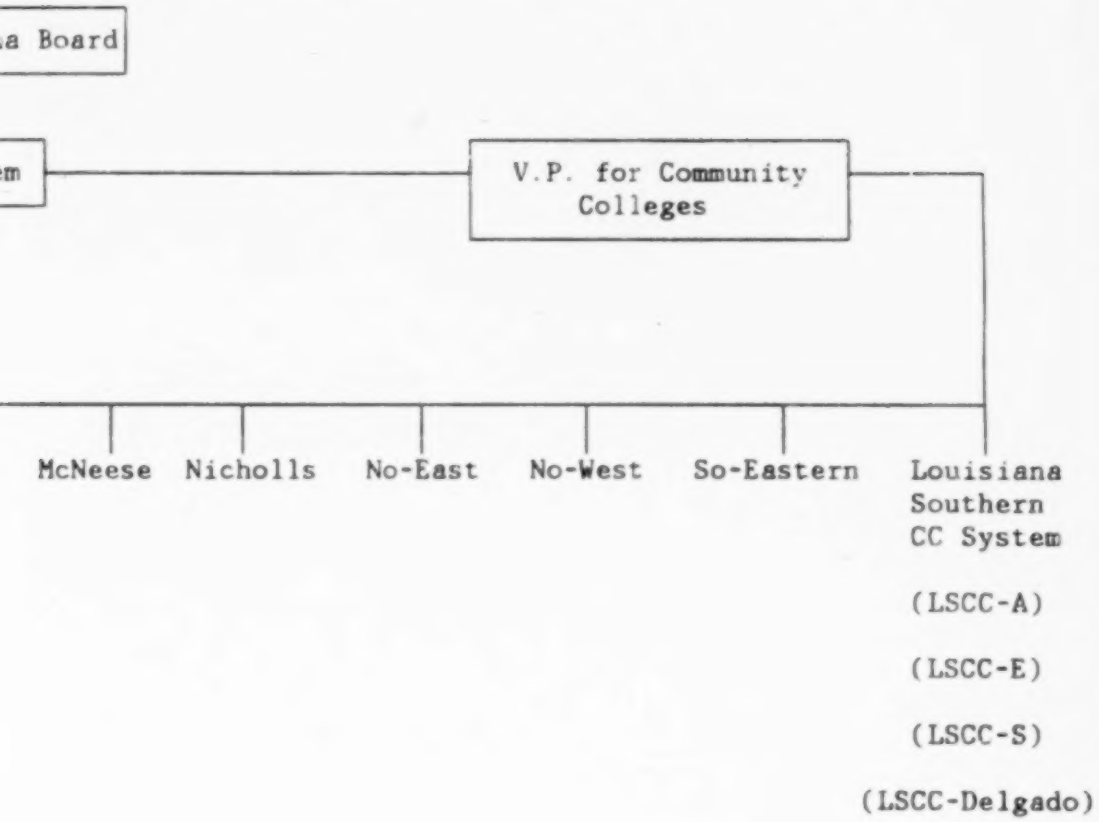

D. *Program Duplication and Program Transfers*

The Court in its list of suggested remedies urged the parties to deal with the problem of duplicative programs, especially by institutions in the same vicinity. The plans submitted by the parties addressed this issue and the related one of program transfer. The State Plan initially submitted in November 1988 proposed certain programs primarily involving Louisiana Tech and Grambling, from which its amended plan backed away. Southern's plan urged program transfers and the establishment of certain exclusive programs on its Baton Rouge campus. The Grambling Alumni Plan dealt with program transfers as well.

Before dealing with these suggestions in detail it is necessary to relate the issue of program duplication and transfer to desegregation. The evidence in this case demonstrates that there is more program duplication in Louisiana than is desirable from the point of view of educational efficiency. Dr. McTarnaghan shows how Louisiana has more degree programs in many areas than does Florida, even though Florida is a much larger system and state. (*See* chart in note 7 *supra*).

McTarnaghan attributes much of this program duplication to the lack of a single board with adequate authority to initiate or terminate programs. He notes that excessive duplication costs money and renders the programs less viable from a qualitative perspective. Moreover, McTarnaghan also suggests that duplication permits schools to cater to students of one race (McTarnaghan Witness Statement, at 9), thereby hindering desegregation goals. Other witnesses, notably Conrad, confirm the view that program duplication is excessive in Louisiana and that it fosters racially identifiable schools (Conrad Witness Statement, at 44-46).[25]

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[25] Joe D. Smith, Kerry Davidson and James Wharton testified generally that program duplication results in wasted resources

Several witnesses testified to the value of selective transfer of high demand programs to promote desegregation. Elias Blake, a Southern witness, argued in favor of program transfers in Florida as success stories in promoting desegregation (Blake Deposition, Vol. I, at 84-86, Vol. II, at 78-80) and cited examples of exclusive program assignments at PBIs. Several other witnesses, however, said that studies of college choice show that students select colleges, not programs, and that they are not likely to transfer when the program does.[26]

It is difficult on the evidence presented to conclude with confidence that program transfers will work. However, it is clear that duplication of programs can have a stultifying effect on desegregation. Therefore, it is imperative that the board take as one of its first missions the reduction of duplicated programs, especially where they involve proximate institutions. To some extent, this assignment is tied to the tiering proposal that the board must also implement. However, tiering involves primarily graduate level programs and much of the duplication currently exists at the undergraduate level. (*See* McTarnaghan table in note 7 *supra*). In terms of the desegregation data

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which is especially intolerable in a time of fiscal crisis. (*See* Smith Witness Statement, at 5-6; Davidson Witness Statement, at 4-7; Davidson Deposition, at 28-30; Wharton Witness Statement, at 1-5.)

[26] Donald Smith, an LSU witness, examined some proposed transfers in Louisiana and concluded that they were unworkable (Witness Statement, at 16-19; Deposition, at 19-34); he also related the example of his own unsuccessful attempt at program transfer in Wisconsin (Deposition, at 66-71). David Wise, another witness for LSU, testified concerning factors affecting student choice, concluding that transfers between dissimilar schools will not work because students want to go where other students have similar backgrounds regardless of program offerings. (Witness Statement, at 30-31; Deposition, at 52-54.) Cameron Fincher, a State witness, testified that program transfers have not worked in Georgia, among other things because programs are often tied to their physical facilities. (Witness Statement, at 5-6; Deposition, at 6-24.)

in this case, undergraduates are a critical aspect. The number of students involved is far larger and the impact of enrollment choice is likely to be more pronounced.

The Situation in Legal Education

There are two state supported law schools in Louisiana, Southern Law Center and the LSU Paul Hebert Law Center, both located in Baton Rouge. In terms of racial identifiability, they present remarkably different pictures. Southern Law is desegregated with a student body 58 percent black and 42 percent white and a faculty (including part-time) which is virtually 50/50. (*See* Witness Statement of B. K. Agnihotri, Chancellor, Southern University Law Center). LSU Law Center on the other hand has a minuscule percentage of black students. During the period of the consent decree it ranged from 1.9 percent to 0.8 percent. In 1988, it was only three percent. Legal education for blacks is particularly important because the ratio of black lawyers to the black population is very low [27] and lawyers are often recognized as the access point to political and economic power.

The issue for the Court becomes how better to desegregate LSU Law School, without undermining the racial balance that Southern Law School has achieved. On the surface, a merger of the two institutions with identical programs which exist virtually side by side might seem desirable; the programmatic difficulties of institutional merger in the university context would be greatly lessened since both institutions award only a single degree (J.D.). But even in the less complicated setting of legal education, merger would involve vastly different institutional goals and faculty outlooks, as well as levels of student achievement, and it should not be resorted to unless other

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[27] A 1977 study appended to Chancellor Agnihotri's witness statement notes that while the ratio of lawyers to population overall in Louisiana is 505:1; it is 6,166:1 for black lawyers to black Louisianians.

approaches fail. The Louisiana bar passage rate at LSU has averaged about 90 percent over the last five years, whereas at Southern Law it is under 50 percent.[28] LSU Law School is a more successful law school from that perspective at this time. It should be given the opportunity to improve its production of black bar-passing graduates. The desired solution is one that increases the number of black law graduates who pass the bar from both institutions.

LSU Law's low percentage of blacks seems to be a function of an admissions policy that makes no effort to attract black applicants, since it is significantly below the percentage of black undergraduates at LSU-A&M and the number of blacks at the state's two private law schools. Moreover, those few blacks who do graduate from LSU Law School succeed in passing the bar (of the 18 black students at LSU since 1982-1983, none has failed the bar). Affirmative action programs that set goals like the new admissions standards at LSU-A&M would seem an appropriate place to begin the desegregation of LSU Law School.[29] A 10 percent category of admissions exceptions whose purpose is to increase the diversity of LSU Law School and the number of black graduates

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[28] The Southern bar passage rate is probably influenced by the higher success rate of its white students. However, even the passage rate of Southern white students is not as high as LSU's. Moreover, the passage rate of Southern's black students appears to be increasing since 1983-1984. (*See* Southern Letter to the Special Master, dated April 6, 1989).

[29] The LSU Medical Center has done a better job of educating black students. The School of Allied Health Professions and the School of Nursing in the period 1980 to 1988 graduated over ten percent blacks. The School of Medicine, both in New Orleans and in Shreveport, during that period had between six percent and seven percent black graduates. The School of Dentistry, from 1984 to 1988, had only 2.5 percent. While licensure data are more difficult to obtain, the black graduates of LSU Medical School showed a passage to failure rate of 25 to 5, over 1984 to 1988. (*See* April 4, 1989 Submission by the Board of Regents.)

seems appropriate. LSU should also offer substantial scholarships to black students and undertake vigorous recruitment efforts aimed at black students.

In the Special Master's Recommended Remedial Plan, provisions for transfer of students between Southern and LSU law schools were proposed as another means for integrating LSU. Southern has taken issue with this suggestion, arguing that it would serve to siphon off the best of Southern's black law students, undermining Southern's successful efforts at desegregation. (Southern Response to the Special Master's Recommended Remedial Plan, at 14-15.) Southern's point has some force because, as noted above, the goal with respect to law schools is to integrate LSU without undermining Southern's success. For that reason, systematic provisions for transferring students need not be undertaken at this time, but Southern students who desire to transfer to LSU should certainly be permitted to do so. The board should, however, see that agreements are reached between the two law schools so that students at one school may take courses at the other. LSU Law's outstanding reputation in the civil law might provide an appropriate context for establishing such transfer courses. In addition, a conscious policy, consistent with law school accreditation requirements, whereby certain specialty courses are not duplicated at Southern and LSU would be a good way to encourage attendance by black students at LSU. If the ratio of black-to-white students at LSU Law School does not significantly improve over the next five years using these techniques, the board should then consider explicit provisions for the transfer of students or even the merger of institutions.

The Situation in Lincoln Parish

There are some circumstances where the parties have agreed to program transfers that should be recognized. In Lincoln Parish, Louisiana Tech and Grambling have

reached agreement on a series of program transfers, some of which were incorporated in the State's Original Plan.[30] Under the State's Plan, the following programs and majors were to have been transferred from Grambling to Louisiana Tech:

M.S., Elementary Education-Special Education

B.S., Speech, Language and Hearing Specialist

B.S., Special Education (Pre Non-Categorical Early Childhood Dual)

B.S., Special Education (Mild/Moderate Elementary Dual)

B.S., Special Education (Mild/Moderate Secondary)

B.S., Art Education

B.S., French Education

B.S., Home Economics Education

B.S., Industrial Arts Education

B.S., Music Education

B.S., Social Science Education

B.S., Communications and Theatre Education

B.S., Institutional Management-Food Production Management

B.S., Geography

B.S., Art

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[30] In its Amended Plan, the State recommended that the B.A. degree in social welfare offered at Louisiana Tech and the B.A. degree in social work offered at Northeast be transferred to Grambling. It noted that 9 students (5 white, 4 black) are currently enrolled in Tech's program and 165 students (107/58) are currently enrolled in Northeast's. The State also recommends that the two-year A.S. degree in nursing at Louisiana Tech with 180 students (153/27 also be transferred to Grambling. (Amended State Plan, at 9-10.)

The following programs and majors were to have been transferred from Louisiana Tech to Grambling:

B.A., Social Welfare

B.S., Health Education (Recreation option)

B.A., Spanish Education

B.S., Speech Education

M.S., Business Education

M.A., Art Education

M.A., Social Studies Education

M.A., English Education

In addition, Grambling and Louisiana Tech were to share services in such areas as student registration, student records, student assessment, classroom assignment, joint/collaborative academic centers, libraries, computer centers, graduate programs and sponsored research.

The Master notes with satisfaction the extent to which Grambling and Louisiana Tech and their presidents have been able to agree upon program transfers that will benefit the desegregation efforts the Court requires. Even under the consent decree, which the Court declared to be a failure for the state as a whole, several of the Grambling-Tech accords produced a positive other race presence on their campuses.[31] The new accords must be viewed in light of the prior successes and good working relationships these institutions have developed. This stipulation which is endorsed by the State and the United States lists the same program transfers as those stated in the State's Plan with a few exceptions (Grambling has deleted the

[31] Grambling reports that white students constitute 15 percent of the enrollment in its consent decree programs overall and that during the period of the consent decree the percentage of white faculty increased from 11 to 24. (Grambling Alumni Post Hearing Memorandum, at Exhibit B.)

transfer to Tech of a B.S. in Institutional Management-Food Production Management and Tech has added an M.A. in Art Education to its transfers to Grambling) that will be incorporated in this recommendation. The stipulation appears as Appendix B. The only caveat to acceptance of the stipulation relates to the need for the newly created board to determine whether any of these transferred programs is duplicative of those offered elsewhere so that it should not be offered at all. Subject to that kind of objection, the Master endorses the stipulation and recommends it to the Court.

E. *Enhancement*

The Court emphasized in its opinion that the consent decree which was premised on funds to enhance the formerly black institutions did not work. It urged that other solutions be found and suggested several which have already been discussed and analyzed. The Master, in rulings on the remedy phase, emphasized that while consent decree funding was not in issue, "testimony on enhancement of formerly black institutions remains relevant as long as that testimony connects to the issue of ending the dual racial identifiability of these institutions." (Order of February 20, 1989.) Several witnesses have testified to the value of enhancement funds. Leslie argued that enhancement funds under the consent decree had helped to desegregate Grambling and evidence discussed above supports that claim. Moreover, McTarnaghan testified that enhancement was a key element in the desegregation of Florida A&M, which received $52 million (McTarnaghan Hearing Testimony, at 56-58, 90-91).

Enhancement funds may be necessary for a variety of purposes. They may be needed to implement the program transfers. They may also be needed to implement the new programs sought by the PBIs. Southern's plan calls for several million dollars in enhancement funds to support the creation of nine new Ph.D. programs and Gram-

bling has requested $950,000 per year to continue the funding of certain successful consent decree programs. Moreover both Southern and Grambling requested significant capital outlay funds for improvements to physical facilities.

The record is not, however, clear enough for the Master to recommend that the Court order specific dollar amounts of operating or capital to be spent on enhancement. That determination requires carefully drawn budgets that have not been made a part of these proceedings.[32] Nonetheless it is clear that enhancement dol-

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[32] In their comments on the original Recommended Remedial Plan, Southern, the Grambling Alumni, and especially the United States have taken the Special Master to task for not spelling out specific amounts for enhancement spending. (Southern Response, at 15-17; Grambling Alumni Response, at 5-6; United States Response, at 18-19). Each argues, based on experience, that unless the state's obligation is set in concrete, PBIs will not receive the necessary funding. But although there may be some validity in that point, the fact remains that the record in this proceeding simply lacks the details and specifics necessary to make final determinations about enhancement dollars. Southern and the Grambling Alumni have submitted only skeletal budgets and conclusory demands for money; the United States has suggested no specific dollar amounts. Moreover, setting appropriate levels for enhancement spending is precisely the kind of detailed determination that is best left to the new board with its expertise and staff support. At least for the Master, there is no reason to believe, as some parties seem to suggest, that the new board will not undertake in good faith its obligation to set enhancement spending levels consistent with the remedial goals of this plan.

For the board's work on this issue, as well as a myriad of others, the United States has also suggested that the Court set specific deadlines. (*E.g.*, United States Response, at 14 (60 days to set missions and admissions standards, 180 days to set high school coursework requirements).) Given the complexity of the tasks to be undertaken, and the variety of variables, such deadlines are valuable as guidelines and have also to some degree been incorporated into the Proposed Order. But deadlines can become counterproductive, forcing the board to focus more on meeting or extending them than on the substance of the task at hand.

lars must be made available as soon as they can be accurately determined in order to implement the program transfers recommended herein and any other new programs the single board orders. The president of the system and his or her staff must calculate the enhancement funds needed for operating purposes and expend them properly.

It is difficult to be more precise on the enhancement issue at this stage even though that makes the enhancement remedy less than self-implementing. The best that can be done is to set some standards for enhancement funding that the board and president should utilize in their deliberations. Enhancement funds should be set aside and identified as such in the budgeting process. This may require that a certain percentage of the state higher education operating budget be designated each year to meet agreed upon enhancement goals. Increases in state operating funds that are forthcoming in the future should consider enhancement funds first. The same should hold for capital funding. In both cases specific percentages of new funds could be designated for enhancement. In the case of new capital projects, no new projects (except for maintenance ones) should be commenced until the enhancement projects have been undertaken. The president and the board should establish a budget for enhancement, both operating and capital, within the first budget year and prioritize the implementation of these funds over the succeeding years.

It has also been brought to the Special Master's attention that the current fiscal crisis facing the state may lead to cuts, rather than increases, in the overall higher education budget. (*See* May 4, 1989, letter from John N. Kennedy to the Special Master.) Under one plan that has been publicized, the state is apparently considering quite severe cuts that would involve closing the majority of state universities. (*See* "Doomsday Plan Would Close 10 La. Colleges", *The Times-Picayune*, May 17, 1989, at

B-1, col. 1.) Obviously, such action could have dramatic consequences for the implementation of this plan. It is not, however, the case that the constitutional requirement of desegregating public higher education necessarily precludes budget cuts. Since the necessity for higher education budget cuts has yet to be determined, the most that need be said now is that all cuts as well as increases must be made consistent with the desegregation goals of this plan. At a minimum, that means that funding reductions should not disproportionately affect black students or the PBIs and that existing funding for those PBI enhancement programs that have succeeded in attracting substantial other race students should be protected from budgetary ax.

F. *Other Race Recruitment and Retention*

Up to now the remedies discussed have been largely dependent upon structural changes that are intended to encourage desegregation. But other, less dramatic, remedial techniques could have equally postitive practical consequences. Ultimately desegregation comes down to how well an institution does hands-on recruitment and retention of other race students. The United States in its plan asks that the Court order the State to formulate plans to improve the recruitment of minority students, faculty, administration and staff. Its witness, Dr. Richardson, argues that the commitment of state officials, especially administrators, is a crucial factor in creating a successful environment for desegregation policy. (Richardson Witness Statement, at 9-13.) This approach is seconded by the state's witness, Eugene Trani. (Trani Witness Statement, at 17-20.) McTarnaghan states that the most important factor is the commitment of university leadership. Other witnesses (*e.g.*, O'Brien Deposition, at 22) emphasize the need to use admissions officers whose assignment is to recruit minority students. These officers are often most effective when they are of the same race as those students sought to be recruited.

Witnesses (McTarnaghan and Conrad) also testified about the need to attract other race faculty as role models in the recruitment of minority students. Conrad in particular noted the importance of black faculty at PWI institutions and recommended the "grow your own" graduate faculty approach used successfully at Wisconsin. (Conrad Witness Statement, at 23-24; *see also* Trani Witness Statement, at 17.) This is an approach that Louisiana should try, especially after it tiers its graduate programs and uses other race scholarships to attract students.

Several witnesses stressed the importance of other race scholarships (for example, Dr. Spikes, *see* Witness Statement, at 20-21; Deposition, at 36-40). The State/Task Force report even suggested a program of 8,000 scholarships at a cost of $20 million per year. Other race scholarships were utilized under the consent decree and there seems to be a consensus that they should continue. In fact Dr. Conrad proposed a subsidy program for institutions as well as individuals that would reward them for improving the desegregation picture at their institutions (Conrad Witness Statement, at 21).[33]

There is also the need to develop relationships between colleges and predominately black (or white) high schools. One of the barriers to integration is the strangeness of institutions to prospective other race candidates, which

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[33] In its comments on the Recommended Remedial Plan, the United States has criticized the use of financial incentives as proposed by Dr. Conrad. The United States argues that incentives will provide a "powerful incentive to discriminate against black students" at PBIs and will also disproportionately disadvantage PBIs for whom it will be harder to attract other race students. (United States Response, at 19). Either the United States is assuming that the board will set unreasonable goals by which to award incentives or it is anticipating that PBIs will fail to live up to reasonable goals. Incentives should only "disadvantage" PBIs if they fail to live up to *reasonable* goals—and that is precisely why financial incentives can be a sound strategy for desegregation.

creates feelings of alienation that are difficult to overcome. If institutions reach out to high school students at an early age (*e.g.*, ninth grade) they can generate new students for their own institutions and also improve the likelihood of those students attending college. Summer programs, conducted on campus and utilizing dormitories, have worked well in many other states to open up new opportunities for minority students. In Louisiana, Southeastern has a pivotal role to play in this regard. Given its location between New Orleans and Baton Rouge, and the possibility that it will remain open admission under the new tiered structure, Southeastern could end up being the "white flight" school once LSU and UNO restrict their admissions.[34] By focusing on high schools in New Orleans with a high percentage of minorities, Southeastern can contribute to an awareness of its potential for black students as well. The administration has indicated a willingness in this proceeding to do just that. (*See* Supplemental Witness Statement of G. Warren Smith, President of Southeastern; *see also* Board of Trustees' Post Trial Memorandum, at 11.) Other four-year institutions have the opportunity to play this role as well. One of the assignments of the new board should be to coordinate and fund the early identification and placement of minority students at campus-based program during the summer.

G. *Monitoring Compliance*

The views of the parties differ widely over the need for a monitoring function as part of the Court's order. The state is convinced that the single board concept alone is sufficient to ensure compliance with desegregation goals, whereas the United States placed continued emphasis upon the need for an independent monitoring function

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[34] Indeed there are some indications that this has been occurring already as Southeastern has slid back in its black enrollment during the consent decree period from 12.6 percent black in 1981 to 6.7 percent in 1988. (*See* Chart 1 *supra*.)

even under a single board arrangement. Monitoring in this setting is of course not a new idea. The consent decree established a monitoring committee that consisted of two representatives of each of the four higher education boards. This committee has been criticized as ineffective even by its last chairman, Joe D. Smith, a witness for the State (Smith Deposition, at 29-34). Dr. Davidson attributed its failure largely to the turf protection that resulted from having each board represented on the committee (Davidson Witness Statement, at 8). Of course Dr. Davidson also testified that the single board would displace the need for a monitoring committee. Others such as Dr. Conrad (*see* discussion at pp. 45-46 *supra*) have instead put more emphasis upon a newly formed monitoring committee than upon the single board concept. Southern suggests creating an independent monitoring board with members to be drawn from the existing four boards which of course simply reinstates the ineffective monitoring system that was part of the consent decree. The United States suggests the creation of an independent monitoring body whose members are drawn from nominations by the parties. This body would meet annually to review reports submitted according to the Court's direction. (*See* United States Post-Trial Findings and Legal Memorandum, at 41-43.)

The need for a monitoring function is premised largely upon the Court's continuing jurisdiction over this case. If in fact it chooses to oversee the case for a period of years, then some form of monitoring is necessary simply to aid the Court in the exercise of its jurisdiction. The remedies discussed herein place most of the responsibility for compliance upon the state and its institutions, which in the judgment of the Master is where responsibility should lie if desegregation is to become a reality for Louisiana. The single board ad its chief executive are given extensive powers to end the racial identifiability of Louisiana higher education. At the same time, of necessity much of

the impact of this remedy is to be felt in the future. Thus it is difficult to argue that the system should be released from oversight by the Court at this stage. A period of review, over five years, is the only prudent way to assure the implementation of the remedies that have been proposed.

Assuming court review, some kind of monitoring committee is inevitable. The most effective one would be small in number, experienced in makeup and independent in outlook. It must not intrude upon the day to day operatons of the board, but it should provide annual reviews and be available to answer specific requests from the board, especially in the early years. A three-person committee, with a chair, selected from names of persons with relevant experience submitted by the parties to the Court would meet this need. The committee should review agreed upon desegregation goals established by the board for each of its institutions. It should hear the views of the United States on the progress that is made each year and it should make an annual report to the Court. It should also be available, on an as-needed basis, to assist the board in resolving any questions that may arise concerning implementation of the Court's order.

H. *Interim Procedures*

The parties have noted that implementing any remedial plan ordered by the Court, especially a plan calling for the formation of a single governing board, will require some interim transition time. Thus they have debated what procedures should be adopted for implementing the Court's order during the transition period.

In the original remedial plan filed by the State, it was suggested that the single board itself be responsible for refining and implementing the proposed remedial actions, implying that implementation would necessarily be delayed until the board was in place. That position

was reinforced in the State's Amended Plan, which called for even more study and less immediate action. (*See* Amended State Plan, at 3 ("The Governor also suggests, respectfully, that a more prudent approach would be to allow a newly constituted, racially-balanced and fully representative single governing board for public higher education in Louisiana to study these issues in a less emotionally-charged and a less political environment for considerably longer period of time before reaching any conclusions.").)

The United States, suggesting that it would take 18 to 24 months to restructure the current four-board system, has taken the State to task for its perceived foot-dragging. (Amended United States Plan, at 10.) Arguing that the law demands swift action to eradicate illegal segregation, the United States said that delay should not be permitted. This position was reaffirmed in the United States' post-hearing filing. (United States Post-Trial Findings and Legal Memorandum, at 17.) For an interim procedure, the United States initially suggested that desegregation remedies should be implemented by an existing board, such as the Regents. Implementation efforts could then be passed along to the single board once it was in place. (Amended United States Plan, at 10; *see* note 2 *supra.*)

To that proposal, the State responded with its own suggested interim procedures; the State argued on its Post-Trial Memorandum that the Court should exercise its equitable power to appoint Governor Roemer as temporary receiver of the Louisiana higher education system. (State of Louisiana Post-Trial Memorandum, at 30-34). The State cited legal precedent for the appointment of such a receiver, *see Newman v. State of Alabama*, 466 F. Supp. 628 (M.D. Ala. 1979), and argued that the Governor is well-acquainted with the state of higher education and is in the best position to take what-

ever interim steps are required. The other parties have all objected to that suggestion. (*See* April 12, 1989 Joint Motion by Southern Supervisors and Grambling Alumni to Strike the State's proposed amendment as untimely; May 9, 1989 Transcript, at 77.)

In the Recommended Remedial Plan, the Special Master suggested that no special interim procedures are necessary so long as the new board is formed expeditiously. The Recommended Remedial Plan noted that implementation of the recommendations contained therein would require numerous specific decisions by the new board. Those specific decisions and recommendations would require additional study and consideration. Were implementation handed over to an interim organization or the Governor, they would have to initiate this process, only to have control taken away as soon as the single board is in place. The board would then be confronted with a partially implemented plan and might very well disagree with the steps that had been taken. In order to carry out its own plan, the board would first have to undo those steps before implementing the remedial plan as it saw fit. In sum, adopting special procedures for interim implementation of the remedial plan could easily be counterproductive.

In their comments on the Recommended Remedial Plan, the State, the Board of Regents, the Board of Trustees and the LSU Supervisors have all supported the Special Master's approach to interim procedures. The United States and Southern University, however, have vigorously objected, arguing that failure to adopt specific interim procedures would lead to unacceptable delay. Southern at first proposed that the legislature immediately appoint a governing board (Southern Response to the Special Master's Recommended Remedial Plan, at 6), but then joined with the United States in requesting that the Special Master appoint an interim board composed of 17 members from the four current boards.

(United States Response to the Special Master's Recommended Remedial Plan, at 9-10; Recommended Appointments of the Southern University Board of Supervisors, at 2-3; May 9, 1989 Hearing Transcript, at 51.) Under Southern's proposal, each of the current boards would receive an approximately equal number of members on the new board, with four each coming from the LSU Supervisors, the Southern Supervisors, and the Trustees; five would be drawn from the Board of Regents. The United States also recommended that the current Commissioner of Higher Education serve as interim president.

At the May 9, 1989 hearing, the Special Master solicited the views of the State and the other three governing boards on this proposal. The Master also requested that the parties provide the resumes of current board members from which selections for an interim board might be made. The State, the Boards of Regents and Trustees, and the LSU Supervisors have all strongly opposed interim appointments by the Special Master. The State argues that interim appointment by the Special Master is "anathema" to the concept of the remedial plan because it wrests from the State responsibility for implementing the plan and would erode relationships between the state, the board and its president. (State Response to the Special Master's Instructions Regarding Governance, at 2.) The State also opposes limiting membership on the interim board to current board members. (*Id.* at 6 n. 4.) Following the May 9, 1989 hearing, the Board of Regents held a special meeting and voted to oppose appointment of an interim board. (*See* Attachment B to the State Response.) The Commissioner of Higher Education also asked that she not be considered for the post of interim president. (*See* letter of May 15, 1989 from Sally Clausen to the Special Master.)

In response to the Master's concerns and in order to minimize any delay resulting from transition without an interim board, the Governor has committed to appoint

a governing board within seven days of the Court order implementing the plan. (State Response to the Special Master's Instructions Regarding Governance, at 5.) The Governor also promises to press for confirmation of the nominees by the Senate within one week of the appointments and has already conducted preliminary talks with the Senate leadership regarding such confirmation. (*Id.*) While a 14-day appointment and confirmation process may be overly optimistic, 30 days to have the board in place seems entirely feasible. The board would then itself be in a position to select a chair and begin assuming authority over the remedial plan.

If such a timetable can be followed, there is little to be gained by interim appointments by the Special Master. As was stated previously, from the Master's perspective, the most important thing is that the new board be set up and put into operation as expeditiously as possible. If expeditious appointment can be accomplished by the state through normal political processes, there is no need for additional federal intervention. If, however, the board has not been appointed and confirmed within thirty days after the Court order implementing the plan, the Court, upon recommendation of the monitoring committee, should undertake to appoint an interim board.

It is to be expected that selection of a new president for the system of higher education may take several months; indeed a national search could take up to a year. While it might be preferable to wait until this key appointment is made before major decisions under this plan are made, the board needs to appoint an interim president as soon as it is constituted so as to begin making the necessary decisions called for by the Court's order. The earliest decisions will be largely logistical in nature, for example, choosing location, offices and staff. The major policy decisions under the Proposed Order must be completed within six months; although the pres-

ident may be in place for part of this time, the interim president must begin making these decisions. In that connection, there need be no prohibition on the interim president being a candidate for the permanent position, unless the board feels strongly to the contrary.

During the 30 days that the board is being assembled and taking over management authority, the current boards and their staffs can provide valuable assistance. The full cooperation of these boards during what is a very short transition period is, of course, fully to be expected since three of those boards, as parties to this proceeding, have argued in favor of the single board concept. In the case of the one dissenting board, Southern, there are sufficient assurances in the composition of the new board to gain its full support. In each case, such support from staffs, as well as board members, is vital to the success of this order.

V. CONCLUDING NOTE

This Final Report and Proposed Order represent the considered judgment of an experienced observer and participant in the higher education process. They offer the parties the opportunity to solve one of the most entrenched social problem of our time. If this plan is pursued in good faith and with dedication, then racial identifiability of Louisiana's colleges and universities should be a thing of the past. If not so pursued over the next five years, then the emphasis will shift to direct judicial control and management of the higher education system. If that becomes necessary, it may truly be said that the outcome is self-imposed.

VI. APPENDICES

APPENDIX A

Witness List

Witness	Party
1. B. K. Agnihorti Chancellor Southern University Law School	Southern
2. Walter R. Allen Associate Professor Sociology University of Michigan	Southern
3. Alexander W. Astin Director Higher Education Research Institute UCLA	Southern
4. Harlan Bareither	Regents
5. A. Troy Barksdale	LSU
6. Sharon Beard Deputy Commissioner Higher Education Board of Regents	Regents
7. Elias Blake Director Higher Education Policy Research Howard University	Southern
8. E. Grady Bogue Interim Chancellor LSU A&M	LSU
9. Wayne Brown Dean School of Business Belmont College	LSU
10. James A. Caillier President Delgado	Trustees
11. Kenneth Carpenter Dean College of Design LSU A&M	LSU

Witness	Party
12. Carolyn Collins Associate Dean Junior Division LSU A&M	LSU
13. Clifton Conrad Professor of Higher Education University of Wisconsin	United States
14. Allen A. Copping President LSU System	LSU
15. John L. Couvillion Dean, Student and Institutional Services LSU—Eunice	LSU
16. Kerry Davidson Deputy Commissioner Academic Affairs Board of Regents	State, Regents
17. William E. Davis Chancellor Oregon State Higher Education System	LSU
18. Cameron Fincher Director Institute of Higher Education University of Georgia	State
19. James W. Firnberg Chancellor LSU—Alexandria	LSU
20. William Fuller	Regents
21. Marian Gade Research Association Office of President University of Calif. Berkeley	Southern
22. Robert B. Gex Interim Chancellor SUNO	Southern
23. Davir Grindstaff Education Services Officer Barksdale Air Force Base	Trustees

	Witness	Party
24.	Wilfred Guerin Acting Chancellor LSU-Shreveport	LSU
25.	Ronald K. Hambleton School of Education University of Massachusetts at Amherst	LSU
26.	Carolyn H. Hargrave Provost LSU A&M	LSU
27.	George W. Hardy Attorney and Task Force Member	Regents
28.	William D. Hawkland Chancellor LSU Law School	LSU
29.	Ronald D. Hay Ass't Vice Chancellor Administrative Information Systems LSU A&M	LSU
30.	J. K. Haynes High School Principal	Southern
31.	James B. Henry Dean, College of Business Administration LSU A&M	LSU
32.	Sharon Hogan Director of Libraries LSU A&M	LSU
33.	Manuel L. Ibanez Chancellor for Academic Affairs & Provost, UNO	LSU
34.	Johnny Jackson, Jr. Member of New Orleans City Council	Southern
35.	T. J. Jemison Reverend and President, National Baptist Convention	Southern
36.	Joseph B. Johnson President of Grambling	Trustese, Grambling

	Witness	Party
37.	Harvey Kaiser Senior Vice President and Professor of Urban Planning, Syracuse University	United States
38.	Donald H. Kraft Chairman Department of Comupter Science, LSU A&M	LSU
39.	Lucie Lapovsky	Regents
40.	Larry Leslie Director Center for Study of Higher Education University of Arizona	United States
41.	Charles L. Martin LSU System	LSU
42.	David McCormick Vice President Academic and Research Affairs Board of Trustees	Trustees
43.	O. Carruth McGehee Dean, Academic Services LSU A&M	LSU
44.	Sean P. McGlynn Vice Chancellor for Research LSU A&M	LSU
45.	Edward McLaughlin Dean, School of Engineering LSU A&M	LSU
46.	Roy E. McTarnaghan Interim President University of North Florida; Vice Chancellor University of Florida System	State
47.	James Midgely Dean, School of Social Work LSU A&M	LSU
48.	Mary Morale Senior Budget Officer Grambling	Grambling
49.	Anthony Mumphrey Chancellor LSU—Eunice	LSU

	Witness	Party
50.	Gregory M. O'Brien Chancellor UNO	LSU
51.	Gary Orfield Professor Political Science University of Chicago	Southern
52.	Dale Parnell President & CEO American Association of Community and Junior Colleges	LSU
53.	Huel D. Perkins Executive Assistant to Chancellor LSU A&M	LSU
54.	Bill J. Priest Chancellor Emeritus Dallas County Community College	LSU
55.	Daniel D. Reneau President Louisiana Tech	Trustees
56.	Douglas Rewerts Assistant Commissioner for Facility Planning, Board of Regents	Regents
57.	Richard Richardson Associate Director Center for Post Secondary Governance and Finance Research Arizona State University	United States
58.	Perry G. Rigby Professor of Medicine LSU Medical Center	LSU
59.	Juanita Robinson Professor and Dean of Junior Division SUBR	Southern
60.	Charles "Buddy" Roemer Governor	State
61.	Donald O. Rogers Dean, Academic Affairs LSU—Eunice	LSU

	Witness	Party
62.	Marvin Roubique Assistant Commissioner for Finance, Board of Regents	Regents
63.	Frank Schmidtlein	Regents
64.	Rupert Seals Special Assistant to the Vice President Academic Affairs University of Nevada, Reno	United States
65.	William Silvia Vice President for Administration & Finance, Board of Regents	Regents
66.	Eulis Simien, Jr. Assistant Professor of Law LSU Law Center	LSU
67.	Charles W. Smith Dean, College of Education LSU A&M	LSU
68.	Donald K. Smith Professor Emeritus University of Wisconsin	LSU
69.	G. Warren Smith President Southeastern	Trustees
70.	Joe D. Smith Alexandria Daily Town Talk	State
71.	Delores Spikes President Southern University System	Southern
72.	Leroy J. Stark Director, Business Affairs LSU—Eunice	LSU
73.	Joe Terrel Chairman, Southern University Board of Supervisors	Southern
74.	Gail E. Thomas Professor of Sociology Texas A&M	Southern

	Witness	Party
75.	Eugene P. Trani Vice President for Academic Affairs, University of Wisconsin System	State
76.	Larry Tremblay Coordinator of Research and Data Analysis, Board of Regents	Regents
77.	James A. Wharton Chancellor Emeritus LSU A&M	LSU, State
78.	David A. Wise Professor of Political Economy, JFK School Harvard	LSU

APPENDIX B

Lincoln Parish Stipulation

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No.: 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al.*

STIPULATION

IT IS AGREED AND STIPULATED by all parties to this litigation that a reasonable and workable plan for achieving desegregation of the two (2) proximate institutions located in Lincoln Parish, specifically Grambling State University ("Grambling") and Louisiana Tech University ("Louisiana Tech"), is the implementation of a plan based on different roles, scopes and missions for the universities, maintenance of certain programs which have been proven to be attractive to other-race students, selective program transfers and cooperative programming.

For the present time, Grambling will continue its current admission standards. For the present time, Louisiana Tech will establish admission standards that are more selective than its current standards and will move towards becoming a selective admission university.

It is further stipulated that an additional element which will achieve further desegregation in Lincoln Parish relates to cooperative efforts between Grambling and Louisiana Tech. The parties recognize that Grambling and Louisiana Tech have had cooperative programming for over twenty (20) years. Currently, nine (9) programs are in effect. These are in the areas of:

Architecture

Master of Business Administration with options in General Administration and Computer Information Systems

Computer Engineering

Civil Engineering—Drafting Technology

Electrical Engineering—Electronics Technology

Master of Arts in the Romance Languages

Special Education

Wildlife Studies

Master of International Business and Trade

Additional cooperative programming should be undertaken in the following areas:

Engineering

Architecture

Performing Arts

It is further stipulated that, based on the joint proposal of Drs. Reneau and Johnson, the following programs should be transferred from Grambling to Louisiana Tech:

1. M.S. Elementary Education—Special Education
2. B.S. Speech, Language and Hearing Specialist
3. B.S. Special Education (Pre Non-Categorical Early Childhood Dual)
4. B.S. Special Education (Mild-Moderate Elementary Dual)

5. B.S. Special Education (Mild/Moderate Secondary
6. B.S. Art Education
7. B.S. French Education
8. B.S. Home Economics Education
9. B.S. Industrial Arts Education
10. B.S. Music Education
11. B.S. Social Science Education
12. B.S. Communications and Theatre Education
13. B.S. Geography
14. B.A. Art

The following programs should be transferred to Grambling from Louisiana Tech.

1. B.A. Social Welfare
2. B.S. Health Education (Recreation option)
3. B.A. Spanish Education
4. B.S. Speech Education
5. M.S. Business Education
6. M.A. Social Studies Education
7. M.A. English Education

The parties request that the university presidents be given latitude in the implementation of these transfers and that any modifications of these proposals be submitted to the Special Master for review. Although the State does not believe that program transfer is an effective tool to achieve desegregation, the State accepts this proposal for Grambling and Louisiana Tech only based on the recommendation of the university presidents.

Finally, it is stipulated by the parties that the following programs should be continued for the time being at Grambling:

1. B.S. Nursing
2. M.S. Criminal Justice

3. M.S. Social Work
4. D.Ed. & M.S. Developmental Education
5. M.A.L.S.
6. M.B.A.
7. M.P.A.
8. Ed.S.

These programs shall be evaluated at least on an annual basis by the Board of Regents (or, if it is adopted, the single governing board for public higher education in Louisiana urged by the State in this litigation) in order to determine if the programs are quality programs and if they are attractive to other-race students. If either or both such conditions do not exist, the Board of Regents or the single governing board, as the case may be, may terminate the program or programs, subject to whatever review process is adopted by the Court.

Based on the above, the signatories hereto agree that this plan represents a reasonable and workable plan for achieving desegregation among the two (2) proximate institutions.

This Agreement is subject to the adoption of any state wide plan of desegregation.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing has been forwarded to all counsel of record by mailing same, postage prepaid, this —— day of March, 1989.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

v.

STATE OF LOUISIANA, *et al.*

RESPONSE OF THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS TO THE FINAL REPORT OF THE SPECIAL MASTER

[Filed June 12, 1989]

Pursuant to the orders of this court, the Southern University Board of Supervisors ("Southern") submits its comments and recommendations respecting the Special Master's Final Report.

With respect to the matters of principal concern to Southern little has changed from "Recommended Remedial Plan" of the Special Master to his "Final Report."

Southern has objected throughout these proceedings to recommendations that a single governance board is unrelated to desegregation of Louisiana's colleges and universities. Only by transforming the supposed management, educational program, and fiscal efficiencies of a single board over a multi-board system into projected efficiencies in accomplishing desegregation is the Special Master able to reach the completely novel conclusion that a single governance board will lead to increased integra-

tion of our colleges. Southern has chronicled its arguments against this and other reasoning supporting a single board as a remedy for desegregation in its pretrial and post-trial memoranda to the Special Master, as well as in its comments and recommendations to the Special Master regarding his "Recommended Remedial Plan." To avoid repeating here, Southern hereby adopts the arguments it made therein and reurges them at this time. Southern remains firm in its position that the record does not support by a preponderance of the evidence that the adoption of a single board will increase integration or satisfy the requirements of Title VI. Nor is it so shown that even if it would result in increased integration, that it is not an over broad remedy, not tightly and geometrically fitting the court-determined violations.

Further, Southern has argued, that if a single board is to be adopted, it is unnecessary and irrelevant to the single board as a desegregation remedy for the Governor to single handedly appoint all of the members at one time to this most important board. This is unprecedented power. During the constitutional convention of 1973 when the state's present for board system was adopted, much debate was had on the question of whether the then Governor Edwin D. Edwards would be permitted to appoint the entirety of the membership of the then to be established Board of Regents and the three management boards. The issue at the convention was resolved by requiring that members from the then existing higher education boards appointed by other governors be made members of the new boards. This was a fair and reasonable compromise, denying any single governor the political control over the entire higher education system at one instance. The Louisiana State Senate has recently communicated to the court its position that if there is to be a single board, it desires that the legislature make the appointments as in the State of North Carolina. The

advantage there is that no single political official would have control of this most important board, rather the power of appointment would be diffused between 144 legislators, a far less dangerous political consequence for our state. The position of the State Senate should not be lightly regarded in this matter. The Special Master has stated that the governor and three of the state's four governance board, having agreed upon the single board to achieve desegregation ". . . is persuasive evidence to the Master that most of the key participants who are needed to make desegregation work in this case are committed to this course of action." (Special Master's Final Report, p. 50) This is an incredulous statement, since the boards which the Special Master would order out of existence would have no future role to play in insuring the success of the plan of desegregation. But the legislature surely will. If the position of the referenced boards is to be credited in this court's decisions respecting the configuration of the state's governance structure, how much more must the views of the legislature influence the court's choice? The only reasonable course for this court, then, if it is to order a single board, is to provide for legislative appointments.

The alternative of judicial appointment of an initial board is attractive as an interim solution to avoid improper political considerations, but it is undesirable as a long term solution. In the long term, race-neutral issues relative to the single board must be left to the governor, the legislature and the people of the state, where they properly belong.

Finally, Southern has pointed out, that the Special Master's efforts to protect the interest of black students and of historically black institutions by providing for seven black members on the proposed 17 member board will be meaningless if the governor makes the appointments. It must be remembered that the present Governor's actions have been unfriendly and unsupportive of historically black universities. In some cases, they have

been openly hostile, as in the case of recommending the closure of SUSBO by not suggesting funding for it in the 1988-89 budget, and by cutting the Southern University System over 5.8 million in the 1988-89 budget, when all of higher education was cut by slightly over $11 million during that year. The budget recommendations for this year proposed deep cuts to Grambling and Southern as compared to historically white colleges. It is no guarantee that the interest of black students and institutions will be protected by merely requiring that blacks be appointed, unless the appointing authority is neutral and unbiased. Appointment by the legislature would insure a neutral appointing authority. Requiring the appointment of blacks currently serving on the state's existing boards initially appointed by other governor's would also provide a measure of protection.

Further, the special master unaware of a real loophole that he provides the Governor in even avoiding senate confirmation of his appointees to the board prior to the seating of the board members. Under prevailing practice, a Governor may appoint members subject to senate confirmation in between regular sessions of the legislature. The only requirement is that when the legislature comes into session, it must confirm the appointees prior to adjourning, otherwise, the appointees are out of office. As provided for on page 19 of the proposed order, the Governor could appoint board members once the legislature leaves session on July 11, 1989, the last day it can constitutionally meet in regular session, and then explain to the court that confirmation will come later, outside of the required thirty (30) day period. This would effectively deprive the senate of any say in the appointment of board members whatsoever. If appointments by the Governor are to be made; Southern would prefer that paragraph 32 of the proposed order be revised to absolutely require confirmation by the senate prior to the seating of appointees. Additionally, if the court believes that the thirty

(30) day time period for board appointment and confirmation is so short as to present the high probability that it cannot be achieved as required, the more time for impaneling of the board should be provided so that the issue can be made definite. To ask the Governor to try to appoint and the senate to try and confirm within that time and then for the Governor to bring a proposal to the court and the monitoring committee as to what would happen next adds hopeless uncertainty to the appointment scheme, and leaves little incentive for the Governor to complete the process fully or on time.

In addition to the comments and recommendations previously made by Southern in response to the Special Master's "Reccommended Remedial Plan", Southern suggests the following to the court:

1. In view of the Special Master's concerns for duplication of programs, the PWIs (predominantly white institutions) should not be permitted to institute any new adademic program until the PBIs (predominantly black institutions) have been sufficiently enhanced and have attracted a sizeable number of white students; this will be particularly true for graduate level programs and high demand, high cost programs. In fact, the Special Master's agreement to relative enhancement of the PBIs would dictate that such programs be considered for placement first at the PBIs with adequate financial support. Graduate level programs at the PBIs should not be duplicated at the PWIs whatsoever.

2. While the Special Master indicates that the record was not clear enough for him to recommend specific dollars for operation or capital to be spent, he agreed that enhancement dollars must be available to the PBIs. In fact, there is a record available for minimum specified dollars for capital outlay, namely, the dollars attached to those capital outlay

projects already approved for program enhancement and as appeared in the records submitted by Southern University. Similarly, approximate amounts for operating expenses for at least the 1989-90 year can be given on the basis of the record as follows:

(a) Appropriation for newly started enhancement programs in an amount comparable to those approved for the 1989-90 fiscal year.

(b) Dollars for enhancement of existing programs and for accreditation of programs, especially in the areas of engineering, computer science, nursing, mass communications, education, architecture, public policy, business and regional accreditation should be appropriated in amounts of $4 to $5 million each year for each of the next three (3) years.

Those funds are to be appropriated beginning with 1989-90 fiscal year to the universities and made available to them once budgets for their expenditures have been submitted and approved by the governing board with the understanding that only those funds as justified in the budget will be expended.

3. Monies should be appropriated by the state for start-up of new doctoral programs beginning in the 1989-90 fiscal year and carried over in subsequent years as needed for planning and implementation of the doctoral programs. At lease $4 million should be allotted for this purpose at the beginning until proposals can be developed for the new doctoral programs. With at least some monies available, there would be an opportunity for start up of selected doctoral programs without undue delay.

4. No community college should be made operative in the Baton Rouge area until:

(a) the minimum Capital Outlay projects referred to above have been completed; and

(b) programs in business, mass communication, nursing public policy, and other areas have been accredited and reaccredited, during the five (5) year period, have taken place, and at least three (3) new doctoral programs would have admitted students. To do so otherwise would place in jeopardy the opportunity for Southern University at Baton Rouge to attract the community college and then transfer to one of the PWIs.

5. Southern University Law Center and the Louisiana State University Law Center should be funded on the same formula basis. Parity monies should be restored through the formula to Southern University at Baton Rouge.

6. Southern University as one of the two land-grant institutions of this state should be appropriated at the non-formula noies each year for its land-grant functions. Such funding was recomended by the Board of Regents and initially is placed at approximately $2.3 million.

7. The Special Master has recommended that scholarships for other-race students be based on a fixed percentage of each institution's overall operating budget. Inasmuch as some parties in this case have indicated a greater reluctance on the part of whites to attend PBI's rather than the other way around, it would seem more reasonable to allow the PBI's a larger sum for scholarships for other-race students for the first five years.

8. Southern University at Baton Rouge should not be deprived of monies for developmental education during its transitional period to doctoral programs.

9. The court should not recognize any exceptions to admission standards for athletes except as these

athletes might qualify for exceptions in one of the other categories.

10. Southern's period of transition for selective admissions must be extended to at least five years. LSU, on the record, took four years to successfully phase-in even modest selective admission standards. The task at Southern will be more difficult. The requirement of a shorter period is a prescription for failure. General enhancement must precede selective admission and doctoral status.

11. Alphabet (e) on page 27 of the Special Master's proposed Order recommended that a pilot project should commence at Southeastern University for the summer of 1990 for the purpose of developing improved relations between high schools and the college. Southern is much more difficult for PBI's than it is for PWI's. Thus, there is an even greater need for such a program to be implemented at Southern. Special funds should be provided for this and other other-race recruitment efforts in general.

12. That section of the Special Master's proposed Order which deals with "incentives" recommends that roughly equivalent progress relative to integration goals be required of each institution. While incentives for institutions that meet or exceed their annual goals should affect institutions in a positive manner, the punitive aspect of the reverse may, in fact, result in a more rapid deterioration of institutions' efforts as they relate to recruitment.

In conclusion, the Special Master's final report leaves numerous decisions from enhancement to program transfer to the elimination of program duplication and other important decisions to a yet to be established single governance board. To this extent, the report leaves the remedy vague and uncertain. The burden that may be placed on black students, the stark victims of discrimina-

tion by the imposition of selective admissions, community colleges and the elimination of the protective voice of the Southern University Board, as well as the Board of Trustees, is contrary to the purposes of desegregation. The requirement of a single board as a centerpiece of a desegregation remedy makes the whole of the remedy unrelated to desegregation. Southern urges the court to consider the obvious common sense of its argument and to fashion an appropriate order directed to the existing boards to carry out the requirements that truly affect desegregation, such as the recruitment of other-race students and faculty, other-race scholarships, exclusive program offerings, the placement of new high demand, high cost programs in historically black universities, the overall enhancement of historically black universities, the requirement of a serious monitoring effort, the inclusion of realistic timetables by which the desegregative actions are to be accomplished, and the establishment of reasonable incentives to reward desegregative efforts.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served upon counsel for all parties to this proceeding, by mailing the same to each by First Class United States mail, properly addressed and postage prepaid on this 12th day of June, 1989.

/s/ William J. Jefferson
WILLIAM J. JEFFERSON, ESQ.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

UNITED STATES OF AMERICA

vs.

STATE OF LOUISIANA, *et al.*

OBJECTIONS TO FINAL PLAN OF SPECIAL MASTER

[Filed June 12, 1989]

Now comes GRAMBLING STATE UNIVERSITY ALUMNI ASSOCIATION, (GSUAA), through its counsel, THOMAS N. TODD, and represents as follows:

1. The Amendments proposed by the GSUAA to the preliminary plan of the Special Master, are hereby adopted herein, as objections to the final plan, as if fully set out as a part of this document.

2. The Final Plan proposed by the Special Master is unrealistic. The timetable set out to accomplish various tasks has no established priorities. Consequently, it is felt here, that the PBIs. already denied adequate resources, will be relegated to the "bottom of the pile", thereby increasing the harm they have already suffered. As an example of this I offer the following:

A. Within *90 days* after entry of this Proposed Order, the Board must accomplish the following:

1. Develop and implement procedures for use by Advisory Committee. (P. 4 Proposed Order)

2. The appointment of a Vice-President for the Community College System. (P. 10 Proposed Order)

B. Within *120 days* after entry of this Proposed Order, the Board must accomplish the following:

1. The Board shall set admissions standards for Comprehensive Universities. (P. 7 Proposed Order)

2. The Board shall develop appropriate admissions programs for high school coursework that will be required for admission to each institution. (P. 9 Proposed Order)

3. The Board shall insure that LSU Law School and Southern University Law School develop cooperative agreements regarding course taken by students at each institution.

C. Within *180 days* after entry of this Proposed Order, the Board must accomplish the following:

1. The Board with staff shall develop budgets for PBI's capital outlay. (P. 15 Proposed Order)

2. The Board shall reorganize Community College System. (P. 10 Proposed Order)

3. The Board shall review two-year programs at four-year institutions to see if conflicts exist with Community College System. (P. 12 Proposed Order)

D. Within *365 days* after entry of this Proposed Order, the Board must accomplish the following:

—Begin planning for Community College in Baton Rouge. (P. 12 Proposed Order)

3. Considering the past history of how the PBIs have been handled in this state, unless this court establishes priorities, the PBIs may well suffer while this Board work on other matters.

Therefore, it is recommended herein that the Budget process for programmatic and capital outlay projects for PBIs be begun immediately upon the formation of the Board, not within 180 days of its formation. To wait this long is to run the risk of placing universities already behind, even further.

Further, it is recommended that GSU's doctoral program in Developmental Education be retained pursuant to Court Order, considering its record of success and especially with the State's future emphasis on remedial education.

Finally, since GSU and Louisiana Tech have agreed to program transfers and the parties have adopted that approach, it is recommended that those be transferred immediately, by Court Order, on a priority basis with proper funding.

WHEREFORE, for the foregoing reasons the final plan should be amended consistent with the recommendations set out above.

Respectfully submitted,

/s/ Thomas N. Todd
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University Alumni Association

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing OBJECTIONS TO FINAL PLAN OF SPECIAL MASTER has been served on the following counsel of record, properly addressed, by depositing same in the United States mail, postage prepaid on this 9th day of June, 1989.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF LOUISIANA, *et al.*,
Defendants

MOTION FOR A NEW TRIAL AND/OR MOTION TO ALTER OR AMEND JUDGMENT

Defendant, Southern University Board of Supervisors, moves the court to set aside the Findings of Fact and Conclusions of Law and to vacate the judgment entered herein on the 19th day of July, 1989, and to grant defendant a new trial and/or to alter or amend the judgment on the grounds that:

1. The judgment is contrary to the law in that the court decided a major portion of the issues in the case on constitutional grounds, when only Title VI claims were properly before it.

2. The judgment is contrary to the law in that the court supplanted its interpretation of the standard for desegregation of the state's higher educational system for the HEW Criteria which sets forth HEW's interpretation of Title VI desegregation standards.

3. The judgment is contrary to the law in that its provisions for selective admissions, the creation of a community college system, the merger of the Southern Uni-

versity Law Center into the LSU Law Center, and the requirement of reverse incentives or taxes for institutions failing to meet desegregation goals place a disproportionate burden on present and prospective black students, black faculty and black staff, as well as on predominantly black institutions.

4. The court erred in requiring the merger of the Southern University Law Center with the LSU Law Center in that merger of the law centers are not supported in whole nor in part by the record in this case.

5. The judgment is contrary to the law in that it is not tailored to geometrically fit the violation found, but invades other areas of race neutral decision-making that should properly be reserved to the State of Louisiana.

6. The judgment is contrary to the law in that the court's order fails to conform with the rules setting forth the form of judgment for district court orders.

7. The judgment is contrary to the law insofar as it holds that a race conscious remedy to provide for protection of the interest of black students and predominantly black institutions, under the circumstances of this case, is not legally permissible.

8. The court erred in ruling clearly erroneous the Special Master's finding that a presence of black members on the recommended single governance board for higher education should be disproportionately higher than the white presence on the board in order to insure protection of the interest of black students and historically black institutions during a limited transition period.

9. The court erred in ruling that the record before the court provided an insufficient basis upon which to make a specific award as to enhancement, in not requesting additional information from the parties in order to make a specific award, or in the alternative in not articulating guiding principles to be followed by a single board in determining the required enhancements of historically black institutions.

10. The judgment is contrary to the law insofar as it fails to address the requirements for faculty and staff integration.

11. The court erred in ruling that Paul W. Murril should serve as a member of this court's monitoring committee, after setting as a standard for appointment that the monitoring committee members have no connection with any university in the state.

Wherefore, defendants pray that after due proceedings had, the court grant defendants the relief requested.

Respectfully Submitted,

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I hereby certify that a copy of the above and foregoing pleading has been served on the following counsel of record properly addressed by depositing same in the United States mail with sufficient postage prepaid on this 1st day of August, 1989.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF LOUISIANA, *et al.*,
Defendants

MEMORANDUM IN SUPPORT OF MOTION OF THE SOUTHERN UNIVERSITY BOARD OF SUPERVISORS FOR A NEW TRIAL AND/OR MOTION TO ALTER OR AMEND JUDGMENT

Defendant, Southern University Board of Supervisors (Southern) urges this court to grant a new trial on the issue of remedy and/or the issuance of an order in this matter in conformance with applicable law. In connection with its motion, Southern argues as follows:

I.

INSOFAR AS THE JUDGMENT OF THE COURT RESTS STRICTLY ON CONSTITUTIONAL GROUNDS, IT IS CONTRARY TO THE LAW SINCE ONLY TITLE VI CLAIMS ARE PROPERLY BEFORE THE COURT.

In the court's Order and Reasons of August 2, 1988, it held that the plaintiff, the United States of America, has proper standing to bring the instant action under Title VI of the 1964 Civil Rights Act. This limiting ruling was made necessary by the opposition of certain defendants to the standing of the United States to raise claims directly under the Fourteenth Amendment to the

United States Constitution, and by an overwhelming weight of authority well establishing the position that no such claim under the Constitution could be maintained by the United States in this action. *United States v. Philadelphia*, 644 F.2d 187 (3rd Cir. 1980); *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979); *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977). Frankly, at this juncture in the development of the law, it is doubtful that the United States would itself contend that it has standing to raise Fourteenth Amendment claims and would admit that in the absence of a private party plaintiff joining with it, Fourteenth Amendment claims could not be before the court in this action. *See, United States v. Alabama*, 828 F.2d 1532, 1547 (11th Cir. 1987). While Title VI derives from the Fourteenth Amendment, the two are not the same. In a Title VI action, the United States is enforcing the Constitution only in accordance with the express formulated prophylactic means of protecting the Equal Protection Clause as authorized by Congress. Section 5 of the Fourteenth Amendment is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

The Court, in the *City of Richmond v. J. A. Crossen Co.*, (cite) states:

> "Congress, unlike any state or political subdivision, has a specific mandate to enforce the dictates of the Fourteenth Amendment. The power to enforce may at times also include the power to define situations which Congress determines threaten principles of equality and adopt prophylactic rules to deal with these situations."

Chief Justice Burger, writing the plurality opinion in *Fullilove v. Klutznick*, 448 U.S. 448, 483-484 (1980), discusses in detail Congress' unique remedial powers in

comparison with the court's remedial powers to enforce the Equal Protection Clause:

> "Here, we deal not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive, remedial power than in the Congress, expressly charged by the Constitution, with competence and authority to enforce Equal Protection guarantees. Congress not only may induce voluntary action to insure compliance with existing federal statutory or constitutional anti-discriminatory provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct."

Under the above-described power of Congress to authorize and induce state action to avoid Equal Protection violations, Congress enacted Title VI of the 1964 Civil Rights Act and authorized each agency, including the then Department of Health, Education and Welfare (HEW), to promulgate standards by which desegregation could be achieved in a definite time. Title VI, 42 U.S.C. Sec. 2000(d) states:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination, under any program or activity receiving federal financial assistance."

Thus, the remedy to be fashioned in this case must be fashioned in accordance with the dictates of Congress as articulated through Title VI. The court's conclusion on p. 7 of the Opinion and Order that "the system of multiple boards is therefore a defect in the state's system of higher education that violates the federal constitution" is *ultra vires* and unauthorized.

The court's conclusion of unconstitutionality is curious not only for the reason that the plaintiff in this case could not have raised such claim, but also because it is stated for the first time in the court's decision on remedy. It more properly should have been a part of the court's discussion and decision on liability which would have permitted some opportunity for briefing and argument on the matter. But more weighty considerations are involved than mere surprise and lack of notice of the court's thinking along these lines. A fundamental and well settled principle, the doctrine of judicial restraint, requires that federal courts avoid deciding constitutional questions where their resolution is unnecessary to the decision of the case. The United States Supreme Court in *Ashwander v. T. V. A.*, 297 U.S. 288, 347, 56 S.Ct., 466, 483 (1936), long ago expressed the Court's position on this issue:

> "The court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of . . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the court will decide only the latter."

Thus, an avoidance of the constitutional issue has been articulated numerous times since the *Ashwander* decision, and, therefore, leaves little room for tolerating the unnecessary exercise of constitutional adjudication. It is clear that the court should only decide constitutional issues in cases where such a decision is unavoidable.

For example, in *Spector Motor Company v. McLaughlin*, 732 U.S. 101, 65 S.Ct. 152 (1944), the Supreme Court stated:

> "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it

> is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." 323 U.S. at 105.

The philosophy that underlies this doctrine of judicial restraint was expressed by the Court in *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 65 S.Ct. 1409 (1947):

> "The policies ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lay in all that goes to make up the unique place and character in our scheme of judicial review of governmental action for constitutionality." 331 U.S. at ———.

The thrust of this doctrine arguably places an affirmative duty on the court to seek a non-constitutional resolution of the controversy before it. When such a resolution is not possible, only then should the court reach the constitutional issue raised, provided one, unlike here, is properly raised.

In *Jean v. Nelson*, 472 U.S. 846, 105 S.Ct. 2992 (1985), the Court explained that the court below should have addressed the issue regarding the immigration statutes and INS regulations first, rather than after its discussion of petitioner's constitutional right to obtain nondiscriminatory parole consideration. The non-constitutional resolution of the issue was clearly preferable to the constitutional one, in the Court's opinion. *See also, Three Affiliated Tribes of Bertole Reservation v. World Engineering*, 467 U.S. 138, 104 S.Ct. 2267 (1984); *Gulf Oil Company v. Bernard*, 452 U.S. 89, 101 S.Ct. 2193 (1981). In *Lyng v. Northwest Indian Cemetery Protective Association*, —— U.S. ——, 108 S.Ct. 1319 (1988), the Supreme Court refused to reach the First Amendment issue involved in the Forest Service's decision to allow timber harvesting and road construction in an area of a national forest traditionally used for religious purposes by members of American Indian tribes. Explaining the principle of restraint, the Court stated:

> "The principle required the courts below to determine before addressing the constitutional issue whether a decision on that question could have entitled respondents to relief beyond that to which they were entitled on their statutory claims. If no additional relief would have been warranted, a constitutional decision would have been unnecessary and therefore inappropriate. 108 S. Ct. 1323-24.

The court in *Lyng* indicated that after a resolution on non-constitutional grounds, a court might also reach the constitutional issues if further relief is warranted after making an express determination that a full resolution cannot be reached on non-constitutional grounds. Thus viewing the court's ruling on the unconstitutionality of the Louisiana's system of higher education governance and other issues which it has based on constitutional grounds in the light of the most favorable decisions, it seems clear that the uninvited action of this court in striking down a provision of the Louisiana State Constitution has made somewhat short shrift of these principles to which the Supreme Court has gone to great lengths to establish as circumscribing the power of federal courts. To the extent then that this court has reached legal conclusions on the bases of constitutional violations, it has erred not only in deciding an issue not properly before it, but also in disregarding the well established Supreme Court standard of judicial restraint.[1] With respect to remedy, then, the relevant question before the court was "what has Congress demanded of the State of Louisiana through its enactment of Title VI pursuant to Section 5 of the Fourteenth Amendment," not "what might the Fourteenth Amendment have demanded, apart from Title VI requirements." With respect to liability, the

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[1] Lower federal courts have followed this doctrine of avoiding unnecessary constitutional adjudication and instead disposing of controversies on statutory or non-constitutional ground whenever possible. *See U.S. v. Henry*, 709 F.2d 298 (5th Cir. 1983); *Universal Amusement Co. Inc. v. Vance*, 587 F.2d 159 (5th Cir. 1978).

court correctly uses a Fourteenth Amendment analysis to determine the liability question. Title VI provided an adequate basis for this court's decision on liability and, in any event, it was the only ground for decision available to it.

II.

THE COURT IS WITHOUT AUTHORITY OR JUDICIAL POWER TO SUBSTITUTE ITS INTERPRETATION OF THE STANDARD FOR DESEGREGATION OF THE STATE'S HIGHER EDUCATIONAL SYSTEM FOR THE HEW CRITERIA WHICH SETS FORTH HEW'S INTERPRETATION OF TITLE VI DESEGREGATION STANDARDS.

Pursuant to 42 U.S.C. Subsection 2000(d)-1, HEW promulgated guidelines for the desegregation of public elementary and secondary education but delayed doing so for higher education.

Adams v. Richardson, 356 F.Sup. 92 (D.D.C. 1973), affirmed *per curiam*, 480 F.2d 1159, 1164-1167 (D.C. Cir. 1973) ordered HEW to comply with the mandate of 42 U.S.C. Subsection 2000(d)-1 by promulgating guidelines for the desegregation of statewide systems of higher learning. The Court of Appeals found that HEW had delayed in the formulation of guidelines principally because higher education desegregation presented unique and complicated problems for which HEW had not acquired expertise, though it already had considerable experience in the desegregation of elementary and secondary schools. The court then gave HEW sufficient time to conduct a thorough study with the following caveat:

> "A predicate for minority access to quality post graduate programs is a viable, coordinated statewide higher education policy that takes into account the special problems of minority students and of black

> colleges. As amicus points out, these black institutions currently fulfill a crucial need and will continue to play an important role in black higher education."

The court ruled that only after these rules and guidelines were promulgated could HEW seek to enforce 42 U.S.C. Section 2000(d) against any other states named as parties in the suit. Not insignificantly, Louisiana was a party in that suit and was served with the court's mandate and order.

Pursuant to the *Adams* mandate to HEW to comply with its statutory duty under 42 U.S.C. Subsection 2000 (d), HEW promulgated guidelines for the desegregation of higher education. *See, Adams v. Califano,* 430 F. Supp., Order, at 121. *See* Amended Criteria Specifying Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education, 42 Fed. Reg. 40780 (August 11, 1977). Subsequently, HEW revoked those guidelines and promulgated new ones. *See also,* Revised Criteria, 43 Fed. Reg. 6658 (February 15, 1978). *Adams v. Bell,* 711 F.2d 161, 165 n. 28, 29 (D.C.C. 1983).

Southern has argued that the HEW Criteria so required and so promulgated should be accorded the full force and effect of law and can be disregarded by this court only on the grounds of arbitrariness and capriciousness. No such finding has been made. This court has deemed Southern's arguments in this respect not well taken apparently for two reasons. First, the court reasons that the very court that ordered HEW to develop the criteria did not treat them as binding rules, citing *Adams v. Bell,* 722 F.2d 161 (D.C. Cir. 1983), *cert. denied,* 465 U.S. 1021 (1984) where the Court stated:

> "Thus, the point of his various court *orders* as Judge Pratt explained, was not to specify what the final results of enforcement would be in every detail, nor to decree unalterable requirements for compliance with Title VI, but rather to have the department initiate the process of enforcement, the process by

> which the specifics of compliance would then be determined." 722 F.2d at 165-66. (Emphasis Added)

But this ground seems incorrect. A careful reading of the majority opinion will make clear that the court there was not referring to the Criteria as not imposing unalterable requirements, but rather to Judge Pratt's orders. These orders never presumed to decree any requirements for higher education desegregation whatsoever. They simply directed the department to adopt compliance guidelines. Nowhere does the majority opinion refer to the Criteria as not decreeing unalterable requirements, as the State has argued, and with which this court mistakenly agreed.

Secondly, in determining that the HEW Criteria should not be accorded the full force and effect of law, the court relies on the state's argument that HEW itself admitted that the criteria are not promulgated in accordance with rule-making provisions of the Administrative Procedure Act (APA) and are not substantive regulations. The state cited, and the court relied upon, a "Memorandum in Opposition to Respondent's Motion for Dismissal of the Administrative Proceedings" filed in a proceeding entitled *In the Matter of the State of North Carolina*, HEW Docket No. 79-VI-1 (filed by HEW on September 4, 1979, and attached to the State of Louisiana's Post Trial Memorandum), wherein HEW's counsel is quoted as follows:

> "Respondents argue that the Criteria were not promulgated in accordance with the APA requirements. We agree. Respondents argue that the Criteria were not published in the Federal Register as a proposed rule. We agree. Respondents argue that the Criteria are, therefore, not regulations. We agree. Nor were they intended to be."

We have argued to the court that treatment of this "testimony" of HEW's counsel as dispositive of the posi-

tion of the agency and as to the ultimate effect of the HEW Criteria is not permissible. We have argued that the distant arguments of HEW's counsel are not properly before the court and are not properly a part of the record upon which the court may make its decision. But, in any event, it is clear that these arguments and this "evidence" are nothing more than an attempt at the much maligned post-hoc rationalization of agency action. HEW's lawyer in the subject case was faced with pointed opposition seeking to establish that the Criteria, or guidelines, were due no effect since they were not promulgated as rules. He argued that the Criteria, intended as guidelines for compliance with Title VI, need not have been promulgated as rules. *See, Global Van Lines, Inc. v. I.C.C.*, 714 1290, 1299 (5th Cir. 1983). *See, Motor Vehicle Manufacturer's Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 103 S.Ct. 2856, 2870 (1983).

The court will recall that the state argued, and HEW's counsel seemed to have agreed, in the cited memorandum that the Criteria were not promulgated in accordance with the notice and comment provisions of the Administrative Procedure Act and, therefore, the Criteria could not be considered rules. This argument is apparently premised on the provisions of Title 5, U.S.C. Section 553 (b), which states that an agency must give notice and afford an opportunity to comment on any proposed rulemaking that it undertakes.[2]

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[2] There is, however, a benefits exception or exemption under 553(a)(2) for matters relating to public property, loans, grants, benefits and contracts. As a general rule, rule making covering any of these areas is exempt from the standard notice and opportunity for comment requirement of 553 unless the agency specifically selects to waive this exemption. In a statement of public policy published in the Federal Register dated January 28, 1971, the Department decided to waive the exemption, and to require all agencies issuing rules and regulations relating to public property, loans, grants, benefits, or contracts to utilize the public participa-

The question which we are now faced with is whether HEW's failure to publish notice that it was engaging in rule making with regard to the Revised Criteria, rendered these criteria invalid or non-binding regulations of the department. In the case of *Arlington Oil Mills, Inc. v. Knebel*, 43 F.2d 1092 (5th Cir. 1976), the Fifth Circuit Court of Appeals stated:

> "The lack of formal publication does not preclude the effectiveness of an otherwise validated agency action. Citing *U.S. v. Aarons*, 310 F.2d 341, 348 (2nd Cir. 1962)

In the *Aarons* case, the 2nd Circuit held that the failure of APA required Federal Register publication is without consequence to a person having actual knowledge of the agency's actions. Likewise, the Court in *Arlington Oil Mills* found that neither the Department of Agriculture's failure to publish an announcement in the Federal Register, nor its failure to publish a basis and purpose statement, rendered the announcement ineffective as to the parties in the litigation. The *Arlington Oil Mills* court found that the peanut industry had actual notice of a meeting held by the Department of Agriculture to discuss the adoption of a 1976 peanut price support differentials. The court noted that no contention was made that any person was not given a full, fair opportunity to participate in the rule making process. 5 U.S.C. Sec. 553(c). Indeed, as the court further stated, everyone who was a party to the litigation knew about the content of the announcement which had been made. All were deemed to have actual notice of the department's actions, and accordingly, the failure to publish was not fatal to the agency's actions.

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tion procedures of 5 USC 553 (Notice and Opportunity for Comment). Save this waiver, it is significant to note that the Congress would have permitted the enactment of guidelines such as are here without the notice requirements.

Likewise, here, Louisiana had actual knowledge that HEW was preparing the criteria pursuant to an order of the *Adams'* court, a fact of which this court may take judicial notice. In fact, as previously stated, Louisiana was one of the initial ten states determined by the Office of Civil Rights to be continuing to operate dual higher education systems under Title VI; as one of the ten states, Louisiana was named and included in the original actions filed; Louisiana, being aware that HEW required it to file an acceptable desegregation plan failed to do so and was sued by the United States Department of Justice in 1974; and even though Louisiana failed to submit a plan as was required, it was aware that the *Adams* court entered an order directing HEW to establish criteria specifying the ingredients of acceptable desegregation plans for higher education institutions. If the court is not satisfied that these matters may be judicially noticed, the taking of further evidence on this matter would be in the interest of justice.

A. WHETHER OR NOT THE COURT DETERMINES THAT THE CRITERIA ARE LEGISLATIVE RULES, THEY ARE NONETHELESS BINDING ON THE COURT IN THE FASHIONING OF A REMEDY

Because the court found for the two reasons above stated that the HEW Criteria did not constitute a rule under the APA, it concluded that as a result, it would only review and consider the Criteria, but not follow them, in developing the plan. We believe that more than passing notice of the Criteria is demanded and that they are binding on the court in this case whether they are considered legislative rules or not. In this connection, it is significant to note the characterization accorded the Criteria by the HEW counsel in its memorandum heretofore referenced. There counsel states:

> "The Criteria used successfully by several states, were intended to be *interpretive rules*. They represent the Department's interpretation of the requirements of Title VI of the Civil Rights Act of 1964 and 45 C.F.R. Part 80 as they relate to the desegregation of state systems of higher education." See Memorandum in Opposition to Respondent's Motion for Dismissal of the Administrative Proceedings, *In the Matter of The State of North Carolina*, HEW Docket No. 79-VI-1 (Filed by HEW on September 4, 1979), at page 21. (Emphasis added.)

While we do not believe that counsel's arguments dispose of the effect to be accorded the Criteria, nonetheless, if the court is to use the memorandum argument of counsel as evidence to establish that the Criteria are not legislative rules, then it must accord equal treatment and agree with HEW's counsel that they are at least interpretive rules.

But more substantially, the Attorney General's Manual defines interpretive rules as "rules *or statements* issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *See* Attorney General's Manual on the Administrative Procedure Act, 30 n. 3. (1947).

Professor Schwartz defines interpretive rules as "statements as to what the agency thinks a statute or regulation means; they are statements issued to advise the public of the agency's construction of the law it administers." B. Schwartz, Administrative Law, Section 4.6 at 159 (2nd Edition 1984).

Professor Davis' definition of an interpretive rule is "any rule an agency issues without exercising delegated legislative power to make law through rules." K. Davis, 2 Administrative Law Treatise, Section 7:8, p. 36.

Professor Davis sees agency construction of statutes as interpretive rules. "When an administrator either gives

meaning to a statute or answers a question that cannot be answered by finding the meaning in the statute, and when he stated in general terms what he is doing, the statement is called an 'interpretive rule' whether or not anything is in fact interpreted." [3]

Indeed, the Criteria were published in direct response to Judge Pratt's order to HEW to fashion guidelines for the interpretation of compliance standards under 42 U.S.C. Subsection 2000(d)-1. *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973)—substantively affirmed by *Adams v. Richardson*, 156 U.S. App. D.C. 267, 480 F.2d 1159 (D.C. Cir. 1973). The D.C. Circuit held that whether a state had complied or not was a decision for HEW pursuant to certain regulations or standards;

> "It is, rather to assure that the agency properly construes its statutory obligations and that the policies it adopts and implements are consistent with those duties and not a negation of them . . . Id, 56 U.S. App. D.C. at 271-72, 480 F.2d at 1163-64.

The standards promulgated by HEW in response to the *Adams* order clearly are interpretative rules. It must be conceded that the Criteria represent at the very least interpretative rules even if this court rejects the argument above that they are legislative rules.

The question then becomes: what weight is the court to give the Criteria in the court's fashioning of a desegregation remedy. We argue that the Criteria are controlling on the court.

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[3] For a general discussion of the definition of interpretive agency rules, see *Kevin W. Saunders*: "'Agency Interpretations and Judicial Review: A Search for Limitations on the Controlling Effect Given Agencies Statutory Constructions." 30 Arizona Law Rev. 769, 770, f.n. 4 (1988).

B. THE CRITERIA ARE CONTROLLING ON THIS COURT IN THE FASHIONING OF A DESEGREGATION REMEDY UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 UNLESS THE COURT FINDS IT TO BE ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH LAW

In *Batterton v. Francis*, 42 U.S. 416 (1977) the Court adopted the definition given by the Secretary of Labor for what constitutes "unemployment". It did so because Congress had expressly delegated to the Secretary the power to determine what constitutes "unemployment".

The Court said:

> "In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.
>
> The regulation at issue in this case is therefore entitled to more than mere deference or weight. It can bet set aside only if the Secretary exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abusive discretion, or otherwise not in accordance with law.' " *Batterton*, 432 U.S. at 425-26. 26.

The *Batterton* case is interpreted by *Saunders*, *op. cit.* at p. 774 to mean that "the Court established that there was a subclass of interpretative rules, for which authority to construe the statute in question had been expressly delegated to the administrative agency. The courts were to play a minimum role, affording the agency view controlling weight". *See also*, *U.S. v. Morton*, 467 U.S. 822, 834 (1984), wherein it is said: "Because Congress ex-

plicitly gave authority to construe the statute by regulation, in this case we must give the regulations legislative and hence controlling weight, unless they are arbitrary, capricious or plainly contrary to the statute". Professor Monaghan, in *Monaghan, Marbury And The Administrative State*, 83 Colum. Law. Rev. 1, 27-28 (1983) points up that where Congress has explicitly delegated authority for an agency to flesh out and fill in the details of a statutory enforcement scheme that the failure by the courts to grant the agency interpretation the same effect as that due a statute would be violative of the principle of legislative supremacy.

In *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980), the Court held that "informational letters prepared by the staff for the Federal Reserve Board involving major policy without notice to those who are affected or opportunity for comment is binding on a court, unless it is "demonstrably irrational". In that case the question was whether an acceleration clause in a credit sale agreement is required to be disclosed in the Truth in Lending disclosure statement. Resolution of the question required an interpretation of the Truth in Lending Act and Regulation Z promulgated thereunder.

The issue in *Milhollin* was presented in a lawsuit between the creditor and a consumer involving a particular credit sale transaction. The informational letter with respect to this issue was prepared by the staff in response to inquiries from the public and published as Informational Letters wherein the staff gives its opinion on how the Truth in Lending Act and Regulation Z are to be interpreted with respect to specific hypothetical fact situations.

The Court clearly followed the *Batterton* line of reasoning in arriving at its conclusion.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984) the Supreme Court

reiterated in clear language the above stated principle of law following the *Batterton* case. Justice Stevens in *Chevron*, at p. 842-843, stated that "If Congress has explicitly left a gap for the agency to fill, there is an expressed delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute".

The courts have consistently interpreted 42 U.S.C. Subsection 2000(d)-1 to evidence an explicit delegation of authority by Congress to the Secretary of HEW to determine the standards of compliance with Title VI of the Civil Rights Act of 1964. See, *Adams v. Califano*, 430 F. Supp. 118 (D.D.C. 1977); *State v. Dept. of Health, Ed. and Welfare*, 480 F. Supp. 929 (E.D. N.C. 1979), at p. 937, f.n. 4.

Therefore, inasmuch as Congress has explicitly left a gap for the Secretary of HEW to fill in with respect to the meaning of compliance in the desegregation of higher education, it is incumbent upon the courts in formulating plans for compliance to defer to the guidelines promulgated by the Secretary of HEW i.e., the HEW Criteria. Neither this court nor the Master has ever held that the Criteria are either arbitrary, capricious or manifestly contrary to Title VI. Therefore they are controlling on this court with respect to the fashioning of the desegregation remedy.

C. THE HEW CRITERIA HAVE CONTROLLING EFFECT ON THE DECISION OF THIS COURT EVEN IF IT IS HELD THAT CONGRESS HAD NOT EXPLICITLY DELEGATED THE AUTHORITY TO ELUCIDATE THE PROVISION OF TITLE VI TO THE SECRETARY OF HEW

Justice Stevens in *Chevron* at p. 843 said, "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case,

a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

Justice Stevens also noted that whenever the court is confronted with an issue that involves the application of a statutory provision which is not patently clear on the face of the statute and an administrative agency charged with the statute's enforcement has rendered an opinion as to the meaning of the provision in question, the only question for the court is to determine whether or not the agency's interpretation is a permissible construction of the statute. He said, in *Chevron* at p. 842,

> "when a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

At f.n. 11 of Justice Stevens' opinion, at p. 842, he further pointed out that "the court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."

In *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986), the Court carried on the *Chevron* rationale

for the supremacy of the legislature over the judiciary in the construction of statutory enforcement schemes by holding that where the language of a particular statutory provision is inherently ambiguous the agency's interpretation is controlling on the court if it is sufficiently rational so as not to be in clear violation of the statute. Further, in *National Labor Relations Board v. United Food and Commercial Union, Local 23*, 108 S.Ct. 413, 426 (1987), Justice Scalia in a concurring opinion emphasized the fact that the *Chevron* standard for judicial review of agency interpretation of the statute is still controlling on the lower courts with continuing vitality.

The series of cases cited above have prompted scholars to conclude that in the area of agency construction of statutes the agency interpretation has controlling effect on courts in their interpretation of those statutes. In *Saunders, op. cit.* p. 800, Professor Saunders concludes after review of the recent trends in the Supreme Court cases that:

> "The judiciary's role in the interpretation of statutes administered by administrative agencies has undergone a period of decline. In most if not all cases, the agency view as to the meaning of the statute is now due controlling effect, and a court may not substitute its view of the meaning of the statute unless it finds the agency to be arbitrary and capricious or wholly unreasonable".

This view of the supremacy of the HEW Criteria was anticipated by the Fifth Circuit in the following two decisions, *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966) Aff'd en banc 380 F.2d 385 (5th Cir. 1967); *Price v. Denison Independent School District*, 348 F.2d 1010, 1015 (5th Cir. 1965). In these cases the Fifth Circuit held that the HEW Revised Criteria for the fashioning of desegregation remedies in the public school system would serve as a binding standard on all district courts within the Fifth

Circuit. The court stated that the district courts must cooperate with the enforcement of the federal agencies in order to promote uniformity and enforcement. This sensible approach presaged, at least in the area of desegregation, the current thinking of the Supreme Court on judicial review of agency interpretation.

We therefore respectfully urge the court to accept the proposition that in fashioning a desegregation remedy, it must give full and controlling effect to the HEW Criteria. To the extent that it has not done so in its Order, that Order should be modified to properly reflect and incorporate the Criteria.

III.

THE COURT'S ORDER CALLING FOR THE INSTITUTION OF SELECTIVE ADMISSIONS, THE CREATION OF A COMMUNITY COLLEGE, THE MERGER OF THE SOUTHERN UNIVERSITY LAW CENTER INTO THE LSU LAW CENTER, AND THE REQUIREMENT OF REVERSED INCENTIVES OR TAXES FOR INSTITUTIONS FAILING TO MEET DESEGREGATION GOALS, PLACES A DISPROPORTIONATE BURDEN ON PRESENT AND PROSPECTIVE BLACK STUDENTS, BLACK FACULTY AND BLACK STAFF, AS WELL AS ON PREDOMINANTLY BLACK INSTITUTIONS.

The D. C. Court of Appeals, in *Adams*, recognized the need for "more and better trained minority group doctors, lawyers, engineers and other professionals. It counseled HEW in fashioning a remedial scheme for higher education to take into account the "special problems of black colleges." And later in 1977, the district court in its supplemental order, at p. 4, required that:

> "The process of desegregation must not place a greater burden on black institutions or black stu-

> dents' opportunity to receive a quality public higher education. The desegregation process should take into account the unequal status of black colleges and the real danger that desegregation will diminish higher educational opportunities for blacks."

The HEW Criteria adopt these judicially suggested standards and in Section F of the Criteria, it speaks in plain language summarizing the court's already well-stated view:

> "However, as the court has instructed, the transition to a unitary system must not be accomplished by placing a disproportionate burden upon black students, faculty or institutions, or by reducing the educational opportunities currently available to blacks." 43 Fed. Reg. 660.

Southern fails to see how this court's requirements in its order of selective admissions, a community college system, the merger of the Southern University Law Center into the LSU Law Center and the requirement of reverse incentives for institutions will not plainly conflict with these considerations. The referenced judicial pronouncements, as well as HEW's restatement of them, are contained in the preamble to the Criteria, and are given meaning and practical significance under the provisions of the Criteria that dictate the elements of a plan.

It would seem plain that students who are attending or who plan to attend the Louisiana State University Law Center will be unaffected by the requirement for merger. On the other hand, those students who are attending or who plan to attend the Southern University Law Center, the majority of whom are black students, will have to make drastic choices and changes and endure the entirety of the burden of transition to the merged institution. Save for those few black students who attend Southern and who meet the entrance requirements for the LSU Law School, the remainder of the students who

attend or who might attend the Southern Law Center, will have to gain admission through the exceptions provided by the court for special admissions. We have argued before that these special or exceptional admissions label black students and single them out as "inferior" and continues the badge of "second class" citizenship.

The real tragedy, however, is that many black students and disadvantaged students in general who have been able to pursue law degrees through the Southern University Law Center will no longer have this opportunity, meaning that these persons would bear the ultimate burden of the desegregation process, that of exclusion. Just the opposite is contemplated by the Criteria, which hope for and which require more, not fewer, minority lawyers out of the process of desegregation. Even for those admitted, one has to wonder whether a school that would not invite them because it, as the court has said, "makes no effort to attract blacks," would present an environment in which such students could persist to graduation.

The court's concern about the claimed "inferiority" of the law school has no place in this analysis. It is only relevant, if at all, in ascertaining what must be done to make the schools comparable. The use of "first time bar passage rates" as a reason to impose new burdens on the opportunities for black students to obtain law degrees in the state is unrelated and indeed in conflict with the purposes of Title VI and the aims of desegragation. The fact is that virtually all of the Southern Law Center's graduates have passed the bar, although not all have done so on the first attempt. (See Affidavit A attached.)

We reurge our arguments with respect to selective admissions and the creation of a community college system with respect to the negative effect they will have on the entry of black students to four year colleges and the chance that they will have to obtain four year degrees.

If this court is concerned about the productivity of historically black colleges, all of which now do a far better job of producing qualified baccalaureate degree and law degree holding black citizens than the historically white colleges in the State, again, the answer is to strengthen the capacity of the historically white and black colleges to graduate more and better qualified black students.

The obvious threat of selective admissions as spoken eloquently to by Dr. Gary Orfield, an expert for Southern, is to limit the opportunity for access to four year colleges. Community colleges, Dr. Orfield says, are not an answer as a pathway to four year schools. And the experience in Florida with community colleges, the very records of the Florida study show, will do little more than prepare a few blacks for technical jobs, which preparation is already made available through the state's vo-tech system. It will not, as Dr. Orfield testifies, lead to an increase in four year degrees.

Despite Dr. McTarnaghan's representations otherwise, the plain experience in Florida belies his testimony on which this court relies. In any event, this court's allowance of the consideration of the ACT as a factor, without delimiting its use, and otherwise leaving the higher education system open to establish whatever standards it desires for college admission, will doubtless leave untold numbers of black students without even the hope of a college degree.

Further, the requirement of incentives for those schools who do well toward meeting desegregation goals is a positive contribution to the desegregation process only if the measures of progress are made institution by institution and in the light of the different circumstances of each university. The court's Order makes no requirements in this regard and by failing to do so, opens the door for new burdens to be placed on black students and PBI's.

The requirement of reverse incentives or taxes for those who fail to meet the goals is even more unrealistic

and will burden historically black colleges which will have the most difficult time of achieving goals of integration. Notions of inferiority, and of plain racism, will prevent the historically black colleges from moving as fast toward achieving integration goals as can historically white colleges. The outcome is a cruel catch 22. The schools that need more resources to be successful in achieving integration will predictably get less; and getting less, they will obviously continue to be less successful in achieving integration. The burdens placed on these institutions and the students who attend them will be disproportionate to those of students who attend historically white universities.

IV.

IN FAILING TO ACCEPT CERTAIN FINDINGS OF THE SPECIAL MASTER, THE COURT FAILED TO FOLLOW THE REQUIREMENTS OF RULE 53(E)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

As a general rule, the findings of fact of a special master will not be overturned by the district court unless they are clearly erroneous. Otherwise, the district court "shall" accept the master's findings. In its Order and Reasons, the court states that it reviewed the Special Master's findings of fact under the clearly erroneous rule.

The provisions of Rule 53(e)(2) of the Federal Rules of Civil Procedure provide in pertinent part as follows:

> "In an action to be tried without a jury, the court shall accept the master's findings of fact unless clearly erroneous . . . ."

The jurisprudence holds that where a special master has been appointed, pursuant to Rule 53, the clearly erroneous standard is the governing standard of review." *Day v. Wayne County Board of Auditors*, 749 F.2d 1199 (6th Cir. 1984).

In effect, the special master's findings and recommendations are governed by the same standard of review applicable to the district court's findings under Rule 52(a). *Williams v. Lane*, 851 F. 2d 867 (7th Cir. 1988). *Pullman-Standard v. Swint*, 456 U.S. 273, 285-290, 102 S.Ct. 1781, 1788-91 (1982); *Spaulding v. University of Washington*, 740, F. 2d 686, 696 (9th Cir. 1984); *NLRB v. Southwestern Bell Telephone Company*, 736 F.2d 166, 168, (5th Cir. 1984).

The clearly erroneous standard of review has been given a fairly strict interpretation by the courts. The United States Supreme Court in *United States v. United States Gypsum Company*, 33 U.S. 364, 68 S. Ct. 525 (1947), articulated the well-settled standard as follows:

> "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire record is left with a *definite and firm conviction that a mistake has been committed.*" 33 U.S. at 395. (Emphasis Added)

See, also, Bull's Corner Restaurant v. Direct Federal Emergency Management Agency, 759 F.2d 500, 502-503 (5th Cir. 1985) (relying on language of *McAlister v. United States*, 348 U.S. 19, 20, 75 S.Ct. 6, 8 (1954); *Kratzer v. Capital Marine Supply, Inc.*, 645 F.2d 477 (5th Cir. 1981).

Generally, the cases provide that where the findings are supported by substantial evidence, then they will not be found to be clearly erroneous. *Lane v. U. S. Department of Justice*, 767 F.2d 66 (3rd Cir. 1985); *Summerall v. Resolute Insurance Company*, 377 F. 2d 671 (5th Cir. 1969).

Additionally, the United States Supreme Court has held that where two permissible views of the evidence can be drawn, the fact finders choice cannot be overturned as clearly erroneous. *Anderson v. City of Bessemer City*, supra; *Amadeo v. Zant*, —— U. S. ——, 108 S. Ct. 1771

(1988). Although some cases have made distinctions between the strict reach of the clearly erroneous rule depending upon whether the subject findings were based on deposition testimony or live witnesses, recent cases hold that findings based on either kind of evidence should be accorded the same standard of review. *See, i.e., Tri-State Petroleum Corporation*, 845 F.2d 575 (5th Cir. 1988).

Thus, the clearly erroneous rule is strictly applied. The only exception to this standard is in a case where an erroneous view of the law has unfairly affected the findings drawn by the district court or the master. See, *U.S. v. Texas Education Agency*, 564 F. 2d 162 (5th Cir. 1977); *Hinson v. City of Dundee*, 682 F.2d 897 (5th Cir. 1982). In those instances where we object to the court's rejection of the findings of the special master, we also argue that the court has not noted this exception to the clearly erroneous rule in either instance and that otherwise this exception is inapplicable.

A. THE ORDERED MERGER OF THE SOUTHERN UNIVERSITY LAW CENTER INTO THE LSU LAW CENTER VIOLATES THE CLEARLY ERRONEOUS RULE.

In connection with the merger question, the Special Master found:

> "It (merger) has an appeal because planners can in one act combine proximate institutions with high white or black ratios into one racially balanced institution. But this kind of numbers game is often of short term benefit only. Institutions whose only commonality is in fact geographic proximity, may not stay racially balanced in the longer term. Faculty and administration are attracted to institutions because of its academic characteristics and mission orientation. Changing those dramatically upsets career choices and jeopardizes the professional relationships that make a school operate successfully. Merging in-

> stitutions with student bodies of significantly different levels of preparation places the students and faculty in difficulty relationships. While these difficulties may be worked out over time, merger remains a solution that poses considerable risk without any sheer benefits for desegregation or improved education."

Premised on this finding, the Special Master reasoned that a period of five years should be permitted in order to see if the remedies recommended by the order would work to eliminate the racial identifiability of the subject institutions. This recommended trial period, as the Special Master styled it, was applicable to those schools which he deemed obvious candidates for merger. See p. 59 of the Final Report of the Special Master. These "obvious candidates" were LSU A&M and Southern University A&M in Baton Rouge, Grambling-Louisiana Tech in Ruston, and UNO-SUNO in New Orleans, and LSU-SUSBO in Shreveport. The Southern University Law Center and the LSU Law Center were not even mentioned by the Special Master as candidates for merger.

It is easy to understand why the Southern University Law Center would be a less than obvious candidate for merger into the Louisiana State University Law Center. The Southern University Law Center has achieved full integration. In fact, it is the most integrated of the state's institutions of higher learning. According to Chancellor Agnihotri's Statement, the Southern University Law School is currently comprised of 50.3% black faculty and staff. and 49.7% white faculty and staff. The student body, he testified, is 58% black and 42% white. Indeed, throughout the lengthy negotiations surrounding this case and through hearings before the Special Master and through arguments on Special Master reports, nowhere was the suggestion made that the Southern and LSU Law Centers should be merged. Indeed, the Special Master's findings here respecting the risks versus the bene-

fits of merger ring truer here than in any other context. Not only does merger of these institutions pose the risk of the loss of opportunity for black students without the sure benefits of desegregation, but it poses a loss of certain desegregation already existing in the Southern University Law Center.

The findings of the Special Master respecting merger are not clearly erroneous by any stretch of the standard. They are supported by the testimony of each expert witness of each party that addressed the subject. In addition to the testimony of Dr. Wayne Brown and of Dr. David Wise cited in the Special Master's report in support of his findings, Southern University offered testimony against merger through statements and reports submitted by Dr. Elias Blake and by Dr. Walter Allen. No evidence has been offered by any party to these proceedings, in favor of merger or in support of the merger of these institutions that would contradict the findings of the Special Master. Thus, the Special Master's findings on the issue of merger must be sustained by this court. The court's assertion that ". . . the Panel perceives the focal issue concerning legal education to be different from the issue identified by the Special Master" falls well short from meeting the rigorous and unswerving demands of the clearly erroneous rule. That two legal educational institutions exist in the capital city of the state, one more highly selective in admissions than the other, provides no evidence of unwarranted program duplication; nor does it prove that both law centers, if efforts are made by LSU, cannot be integrated. Certainly, no witness testified before the Special Master that this was the case. The court is duty bound, therefore, to reverse and vacate its order respecting merger of the Southern University Law Center.

B. THE COURT'S REJECTION OF THE SPECIAL MASTER'S FINDING THAT A DISPROPORTIONATELY HIGHER NUMBER OF BLACK MEMBERS ON THE RECOMMENDED SINGLE GOVERNANCE BOARD WOULD PROTECT THE INTEREST OF BLACK STUDENTS AND HISTORICALLY BLACK STUDENTS DURING A LIMITED TRANSITION PERIOD VIOLATES THE CLEARLY ERRONEOUS RULE.

The Special Master's report concludes "the crucial question is the number of black members which at least for a period of transition under this new system might be appointed. The number of blacks assigned should exceed the percentage of blacks in the population of Louisiana for a limited period in order to insure both a commitment to the desegregation remedy this court must decree, and an acceptance by the public of the determination to implement the decree." Thus, the Special Master continued, ". . . for a transition period of five years the ratio of white to black should be adjusted to reflect the importance of the task ahead." (Special Master's Final Report, pp. 54-55) Further, on p. 58 of his Final Report, the Special Master states the finding " . . . the creation of a single governing board is a crucial step toward desegregation in this case, and yet its efficacy is threatened unless the interest of the PBI's and black students can be institutionally protected by the new board, the majority of whose constituents will be PWI's and white students. No party has proposed or suggested, and the Special Master is not aware of, any race neutral criteria that could guarantee the protection of black interest as effectively as mandating a substantial black membership on the board." Finally, on p. 60 of the Final Report, the Special Master states: "In sum, the proposed single board structure with an interim quota for minority membership is a constitutionally valid means to help insure that the loss of a separate

voice for the PBI's will not jeopardize the legitimate educational interest of the students they represent."

The court's general statement that the ". . . panel specifically rejects the Special Master's finding that desegregation necessitates a conscious effort to place a quota of blacks on the new board in excess of the percentage of blacks in the population . . .", fails to meet the clearly erroneous standard of review.

V.

THE REMEDY IS NOT TAILORED TO GEOMETRICALLY FIT THE VIOLATION

The remedy ordered in a desegregation case must be narrowly drawn to fit the violation of the right involved, here those protected by Title VI. See *Milliken v. Bradley*, 418 U.S. 717, 744 (1974); *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 420 (1977); see also, "Charges Foreword; Public Law Litigation and the Burger Court," 96 Harv. L. Rev. 4, 49 (1982); *City of Mobile v. Bolden*, 446 U.S. 55, 80-82 (1988); *City of Richmond v. J. A. Crossen Company*, —— U.S. ——, 109 S. Ct. 706 (1989)

Justice Scalia in his concurring opinion in *Richmond*, supra, at 721, states:

> "While thus permitting the use of race to declassify racially classified students, teachers, and education resources, however, we have also made clear that the remedial power extends no further than the constitutional violation." See, also, *Columbus Board of Education v. Penick*, 443 U.S. 449, 465 (1979); *Keyes v. School District No. Denver, Colo.*, 413 U.S. 189, 213 (1973).

The court has violated this well established principle in several respects. The Supreme Court has long recognized that "local autonomy of school districts is a vital national traditional." *Dayton Board of Education v.*

Brinkman, supra, 433 U.S., at 410, 97 S.Ct., at 2770. School desegregation orders, the Supreme Court has said ". . . are among the most sensitive encroachments on that tradition, not only because they affect the assignment of pupils and teachers, but also because they often restructure the system of education . . . . Judicial imposition on this established province of the community is only proper in the face of factual proof of constitutional violations and then only to the extent necessary to remedy the effect of those violations." *Dayton Board of Education v. Brinkman*, 43 U.S. 1348, 1353, 99 S.Ct. 24, 26 (1978).

If this is true for local school boards, how much more compelling must the showing be for a state's entire system of higher education? Here, the court declared the state's higher education governance board structure to be unconstitutional because the boards are "racially identifiable," thus "perpetuating illegal segregation in Louisiana higher education . . . ." We have disagreed that the court could make any such finding of unconstitutionality as it has here done on this purely Title VI case. But, if it could, as in the *Dayton* and *Columbus Board of Education* cases cited, supra, racially identifiable boards, particularly where mandatory segregation has long ago ceased, do not constitute the "factual proof of constitutional violations" there required. These Title VI violations, if even that, were curable by an order by this court requiring an end to such racial identifiability and decreeing the correct racial make-up. Further, the racial identifiability of the boards, which the court condemns as a constitutional defect, was sanctioned by the 1981 Consent Decree, which this very court approved. The court will recall that the Consent Decree provided:

> "Part II
>
> Commitments of Defendants
> *Section One: Governance*
>
> The State of Louisiana is committed to representation on each of the higher education boards without

regard to race. The state adopts the goal of increasing the other-race representatives on the Louisiana Board of Regents, the Board of Supervisors of the Louisiana State University and Agricultural and Mechanical College, and the Board of Trustees for State Colleges and Universities so that the composition of the membership of each board approximately reflects the racial composition of the state's population. *The state adopts, as an interim six-year goal of increasing the other-race representation on the Board of Supervisors of Southern University and Agricultural and Mechanical College so that the racial composition of the Southern University Board of Supervisors reflects the racial composition of the state's population inversely.*" (Emphasis Added)

Under these circumstances, the damning label of "racial identifiability" is hardly warranted, and certainly not "factual proof of a constitutional violation" within the meaning of the cited cases. The court incorrectly states the numerical membership of four college boards, at p. 6 of its Opinion and Order. Under Louisiana's Constitution, the Board of Regents is comprised of sixteen (16) members. LSU and the other management boards are comprised of seventeen (17), not eighteen (18) members, as the court states. Using these corrected figures, the racial makeup of each of the management boards "approximately reflects the racial composition" of the state (and in the case of Southern 'inversely') as the Consent Decree contemplated. The all too obvious fact is, in order to eliminate the racial identifiability of the boards, not even a law needs to be changed, let alone a state constitutional provision obliterated. To change the racial face of the state's boards, the act of one public official, the Governor of the State of Louisiana, can bring about this change. He simply needs to appoint more racially balanced boards as the State Constitution already permits, if indeed more balance is desired by the court or commanded by Title VI or the Constitution. As the Su-

preme Court makes clear, just because a constitutional violation or defect, as the court puts it, is found does not mean that a court can go to the outer limits of its powers to address the violation. A court may go only "to the extent necessary to remedy the effect of those violations", *Columbus Board of Education v. Penick*, 439 U.S. 1348, 1353, 99 S.Ct. 24, 26 (1978), 439 U.S. at 1357, 99 S.Ct., at 27.

Further, the Special Master found no evidence of a guaranteed "stand-off between the two 'systems' (LSU and Southern) and the rest of higher education" as the court states. None exists. Although Governor Roemer in his deposition spoke in general terms about "turf" battles in higher education, he admitted that he meant in political rather than racial terms.

In the context of the overall constitution of the State of Louisiana, it is easy to see that the people of the state made a renewed commitment to equality under the law. The 1974 Louisiana Constitution, of which the governance provisions are a part, were developed by an open, integrated convention, and received overwhelming biracial support in its adoption. It is a modern, forward looking document, and an honest attempt by the people of the state to eliminate the vestiges of a dual system. For the court to now say that the provision of the state's multi-board system, viewed in the context of the entire Louisiana Constitution, which openly and avowedly embraces desegregation, is a vestige of segregation, saddens the heart, and is mystifying to the head.

As we have stated previously, the question of a single governance board is one of educational policy. Where state educational policy conflicts with the adjudicated violation, courts most impose the least intrusive remedy available and justify the impact of the remedy they choose. *Whitcomb v. Chavis*, 403 U.S. 124, 160-161 (1971); see, also, "Note, The Voting Rights Act and Local School Boards; An Argument for Deference to

Educational Policy in Remedies for Voter Violation," 67 Tex. L. Rev. 139, 176.

The HEW Revised Criteria, aside from being the law on the subject, contemplate a fashioning of desegregation remedies under Title VI that are respectful of state's educational policy choice of a governance structure. The Criteria state:

> "Furthermore, from state to state significant differences are to be found and must be taken into consideration. In some states strong centralized 'system' exists including four year and two year institutions; in others, the four year and two year institutions report to separate boards; in yet, others each institution operates under its on independent board. While none of these differences relieves a state of its obligations under Title VI or its constitutional duties they must be taken into account in fashioning an appropriate set of Criteria to be applicable to six states." 43 Fed. Reg. 6660 (1978); see, also, Part IV, Sec. B of the Elements of a Plan in HEW Revised Sec. B of the Elements of a Plan in HEW Revised Criteria. 43 Fed. Reg. 6663.

Louisiana elects its judges, sheriffs and even assessors whereas many other states do not. Accountability is apparently more important to many Louisianans than efficiency.

By what authority then may this court deny the people of Louisiana its educational policy choice in higher education governance? Only when there is no less intrusive measure to redress constitutional violations. Plainly, Title VI, the Criteria published pursuant to it, and judicious directives to the educational boards of our state, provide a far less intrusive and, in the context of our democratic system of government, more effective remedy.

The ordered restructuring of the state's community colleges, judicially required university tiers and selective

admission standards, are other striking examples of the court's over broad remedies. These too must fall under the weight of cited authority. The court recites statistics regarding low graduation rates, the number of non-resident students attending PBI's and disparate college-going rates and college preparation levels for black and white students which it says "demonstrate additional constitutional defects inherent in and perpetuated by Louisiana's present system of higher education." But, these statistics represent more issues which the system of higher education must deal with, rather than ones which it originates or encourages. Whether they together amount to "factual proof" of constitutional violations is open to question. But if they do, they do not suggest as remedies a new, untried, judicially imposed system, without giving the people of the state a chance to choose from among many race-neutral educational approaches to deal with these problems. There is no warrant for federal take-over of Louisiana's system of higher education merely because constitutional defects are allegedly found. If this is true for state prisons, then it is at least equally, if not more, true for state colleges. See *Ruiz v. Estelle*, 650 F.2d 555 (5th Cir. 1981). There the court states:

> "Although it is within the court's authority to order that constitutional violations be rectified if a prison is to remain open, in large part the details of bringing a prison into compliance with the constitution should remain with state prison officials."

Here the court should require the state, through its governor and legislature, to address the "details" of bringing Louisiana's educational system into compliance with federal law.

VI.

SPECIFIC REQUIREMENTS FOR THE ENHANCEMENT OF HISTORICALLY BLACK COLLEGES IS REQUIRED BY LAW

The requirement stated in the Court's Order to include "non-formula expenditures for improving the quality of PBI's *whenever fiscally possible*, amounts to no order at all.

We believe that the language directing the State to provide non-formula funds to PBI's "whenever fiscally possible" falls short of the specificity requirement of Rule 65(d). Clearer and more definite language is demanded. See *Atiyeh v. Capps*, 449 U.S. 1316, 1316, 101 S.Ct. 829, 832 (1981), and the cases cited therein.

The law is also clear that "fiscal possibility" or "financial hardship" cannot serve as excuses for failing to meet federally guaranteed rights. *Liddell v. State of Misouri*, 731 F.2d 1294, 1320 (1984), *Swan v. Charlotte-Midlenberg Board of Education*, 402 U.S. 1, 15 (1971); *Williams v. Edwards*, 547 F.2d 1206, 1213 (5th Cir. 1977).

Enhancement of PBI's, is an essential ingredient of a plan to desegregate higher education. The special master concluded as much. The evidence in this regard was uncontradicted. In light of this clear record, the special master ordered that a percentage of the State's operating and capital budgets be set aside each year to enhance PBI's. Under the clearly erroneous rule as discussed above, the Court cannot reject the master's finding unless there is no substantial evidence on the record. Thus, here, the special master's findings on enhancement must be accepted by this Court.

Once accepted, however, the findings must be given significance. What profit is there to find that enhancement of PBI's is required and then not to order it. The

Court must render an Order here at least reinstating the special master's Order and guidelines on enhancement. Beyond that, this Court could hold a special hearing and receive evidence on the enhancement issue such as the Special Master did on other issues after the record of his hearings was closed. Barring that, detailed guidelines with specific timetables by which decisions regarding enhancement should be made should be ordered by the Court.

Again, we believe the HEW criteria provide the necessary framework. In order to disestablish a State's dual structure, the criteria provided in I(B) thereof:

> "B. Specify steps to be taken to strengthen the role of traditionally black instittuions in the state system.
>
> In support of the specific steps required by I.B., the plan shall include:
>
> 1. Commitments that necessary improvements will be made to permit the traditionally black institutions to fulfill their defined mission. These improvements will extend to physical plant and equipment; quality and range of program offerings; number and quality of faculty; student, faculty and professional staff services; student financial assistance, and other financial support.
>
> 2. Commitments that traditionally black institutions will have the resources (including those enumerated in item 1 above), which are at least comparable to those at traditionally white institutions having similar missions.
>
> 3. An assessment of the physical plant at traditionally black institutions; and
>
> 4. A detailed description of the resources, expressed in dollars and in numbers of personnel to be assigned, which the state system will provide (and the

source for such funds) in order to implement the steps specified in I.B. reported by year for the life of the step or activity.

C. Commit the state to take specific steps to eliminate educationally unnecessary program duplication among traditionally black and traditionally white institutions in the same service area.

To this end, the plan shall identify existing degree programs (other than core curricula) among institutions having identical or overlapping service areas and indicate specifically with respect to each area what steps the state will take to eliminate such duplication. The elimination of such program duplication shall be carried out consistent with the objective of strengthening the traditionally black colleges.

D. Commit the state to give priority consideration to placing any new undergraduate, graduate or professional degree programs, courses of study, etc., which may be proposed, at traditionally black institutions, consistent with their missions."

VII.

SPECIFIC REQUIREMENTS FACULTY AND STAFF MUST BE INCLUDED IN THE COURT'S ORDER

Successful faculty and staff integration will aid the success of student integration. Yet, no specific reference is made respecting this essential element of a desegregation plan. The court must declare specific guidelines in this regard. See HEW Revised Criteria, 43 Fed. Reg. 6662-6663.

VIII.

DR. MURRILL SHOULD NOT SERVE ON THE MONITORING COMMITTEE

This court made a wise statement when it directed the parties to submit nominees for service on the committee who were not connected with a party to the litigation. Southern took that to mean something more than a mere technical requirement. While Dr. Murrill is not now an employee of the LSU system, he has served as chancellor of LSU-BR. Doubtless he remains devoted to this institution, as is to be expected. And doubtless he continues to have a keen interest in the welfare of his former school, and close ties as well with many who still work there and with countless alumni of LSU. This will put undue pressure on Dr. Murrill in making decisions. But more, it will give the appearance of bias and favoritism, whether any exist or not.

Southern hestitates to raise this objection only because it may be misunderstood as a question about the integrity or character of Dr. Murril. Nothing could be farther from the truth. Dr. Murrill is admired and respected by the Southern University Board of Supervisors. It is simply that one would not ask another's father to pass judgment equally on his son and his neighbors' children and expect that problems of old loyalties to the son might not arise from time to time to cloud otherwise clear judgment.

No party must have an apparent or real advantage in matters before the monitoring committee because of who serves there. Dr. Murrill's membership on the monitoring committee, we fear, may give LSU an apparent advantage, and inspite of Dr. Murril's best efforts, a real advantage as well.

In another connection, Southern is concerned about the court's definition of the "substantial progress" standard assigned to the monitoring committee to gauge compliance with the court's order. This language too raises

a Rule 65(d) question. With so much depending on the monitoring committee's interpretation and application of this standard, it is imperative that the term be defined with a great deal of specificity so that each party may be given fair notice of how it must conduct itself in order to comply with the court's mandate.

CONCLUSION

It appears that the court's decision does not comport with legal requirements in several signicant respects. While Southern agrees with certain important provisions of the Order, its disagreements are significant. Southern urges the court to amend its Findings and Conclusions, to alter its judgment, and to take new evidence in accordance with Southern's observations herein. Southern desires a desegregated public higher education system. Its goal is to improve the racial balance of its institutions and throughout the system. But, it believes the law requires that this be accomplished without reducing current opportunities for black students, faculty and staff. Indeed, it must be done as opportunities for these victims of discrimination are enlarged. This is the court's obligation under Title VI as well.

Southern respectfully urges that its motions be GRANTED.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

Section "A"

UNITED STATES OF AMERICA

vs.

STATE OF LOUISIANA, *et al.*

MOTION AND MEMORANDUM TO AMEND OR ALTER ORDER UNDER RULE 59(e)

[Filed Aug. 1, 1989]

NOW COMES, the GRAMBLING STATE UNIVERSITY ALUMNI ASSOCIATION (GSUAA), through its counsel, THOMAS N. TODD, and moves this court to alter and amend its *Opinion and Order* issued on July 19, 1989, pursuant to Rule 59(e) of the Federal Rules.

In support of said Motion GSUAA offers the following:

1. The GSUAA repeats herein its request for a *specific* percentage to be established by this Court, of the State's Budget for enhancement (programs and capital outlay), for the Historical Black Institutions. The court's broad, general treatment of this matter is totally unacceptable. Especially objectionable, is the statement regarding non-formula expenditures for improving PBI's "whenever fiscally possible". p. 41. This *open end, non-specific weasel approach*, leaves open the potential for much mischief on the part of the State of Louisiana. Considering its *sorry* history in dealing with GRAMBLING STATE UNIVERSITY and SOUTHERN UNI-

VERSITY, we cannot and do not expect fairness from the State even if *ordered*. Certainly we do not expect it where what is ordered is unclear.

We also find it interesting that this court *rejects* as an "unacceptable" quota the Black membership of the Board, 7 out of 17 members suggested by the Special Master), where it appears to favor Blacks p. 17; but goes on to establish "quotas" and specific percentages througout the *Opinion* where it appears to be either neutral toward Blacks or tends to help Whites. For instance, LSU's Law School is to establish 10% admissions exception for Black students (not portion of Blacks in State population), p. 41; 15% exception are established to selective admissions, (10% for other race students; 5% for "such as athletes, students with other talents and alumni children); p. 36, for other race recruitment, a fixed percentage of each institutions's overall operating budget shall be set aside by the Board . .", p. 42.

We find it strange that the court is willing to be specific in those areas and yet allow an area as crucial as financing for PBI's to languish in a morass of generalities and uncertainty.

We urge here that specific amounts be established by this Court, after appropriate proceedings (hearings, budget submissions, etc.), for the enhancement (programs and capital), of PBI's. Without those specifics provided, it is our belief that once again the PBI's will be shortchanged.

2. GSUAA objects to and urges this court to reconsider the portion of the *Opinion and Order*, dealing with "incentives" to colleges and universities for meeting desegregation goals. p. 43. Under this plan, rewards will be given in scholarship and other monies to the colleges and universities meeting their desegregation goals as established by the Board. Those who do not meet their goals will receive "disincentives" or will be penalized.

It is felt that based upon the history of the State of Louisiana and other entities in this matter, this plan will impose an *uneven, unreasonable* and *inequitable* burden upon the PBI's. We have no reason to believe that the plan will be administered fairly. Further, this court's own *Opinion and Order* regarding Southern University's Law Center and LSU's Law Center demonstrates how widespread the inequities are when it comes to PBI's, even when the PBI's comply with specific requirements. Even though LSU's Law Center is *segregated*, with almost *no minority participation*, obviously in violation of Federal Law; and Southern University's Law Center, although desegregated, in compliance with Federal Law, this court saw fit to *punish* Southern University's Law Center for compliance and reward LSU's Law Center for its violation. This type of attitude is what has harmed Black Institutions throughout their existence. We have no reason to believe that an "incentive" plan would be administered any differently.

Consequently, we urge the Court to revise the "incentive" program provided by the *Opinion and Order* to either totally eliminating it, or in the alternative applying the penalty portion only to *White institutions*. After so many years of inequality, for the PBI's to be treated equally in this area is not equality, but yet another form of inequality.

3. GSUAA is opposed to the appointment of Paul W. Murrill, a former Chancellor of LSUBR to the Monitoring Committee. Without voicing an opinion on the qualifications of Murrill or any of the other two members of the Monitoring Committee, it is GSUAA's position that he should not serve because of his *prior affiliation with LSU*. Since, what we are seeking is the appearance of "fairness" as well as "fairness" itself, this appointment can meet neither criteria. Therefore, we urge that he be removed and a suitable replacement be found with no prior

relationship with any entity of the State of Louisiana, or any other party in this case.

4. GSUAA is opposed to merger of institutions as a remedy, at any time, now or in the future.

WHEREFORE, GSUAA prays that this court reconsider the *Opinion and Order* issued herein for the reasons set out above, and that:

1. a hearing be held immediately on this and any other motion filed for reconsideration; and
2. That all matters ordered in the *Opinion and Order* be STAYED pending the outcome of Hearings on these motions.

Respectfully submitted,

/s/ Thomas N. Todd
THOMAS N. TODD
Attorney for Grambling State University Alumni Association

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion and Memorandum to Amend or Alter Order Under Rule 59(e), upon the following counsel by U.S. Mail, prepaid, addressed as followed on July 28, 1989.

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This the 28th Day of July 1989.

/s/ Thomas N. Todd
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

UNITED STATES' MOTION FOR RECONSIDERATION AND TO ALTER OR AMEND JUDGMENT

The United States, plaintiff herein, respectfully files the instant motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure and requests this Court to reconsider its opinion and order entered in the instant litigation on July 19, 1989.

The United States respectfully requests this Court to reconsider the below delineated portions of the above-described order: the merger of the LSU and SU Law Schools, the lack of specificity of the provision of enhancement funds, the 10% set aside for special admissions, and the lack of specificity in the equal employment opportunity provisions for faculty and staff, and in the monitoring and termination provisions. Additionally, the United States requests this Court to clarify the schedule for the disbanding of the four governing boards and the implementation of the single board.

Wherefore, the United States, reserving unto it all rights of appeal respecting the instant order, respectfully requests this Court to reconsider and alter or amend

it July 19, 1989 Order as more fully described in the attached memorandum.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION FOR RECONSIDERATION AND TO ALTER OR AMEND JUDGMENT

On July 19, 1989, the Court entered its Opinion and Order in this protracted litigation invoking the desegregation of the Satte of Louisiana's public higher education system. The Opinion and Order adopted, except as expressly modified, the Special Master's Final Report and Proposed Order of May 26, 1989.

The United States, plaintiff herein, respectfully requests this Court to reconsider and to alter or amend its July 19, 1989 Opinion and Order as set forth below.

DISCUSSION

A. The Court Should Reconsider Its July 19, 1989 Opinion And Order Requiring The Merger of The Two Law Schools.

The Special Master at pages 35-38 of his final report found that merger is an extreme remedy that should be resorted to only if other remedies have failed [1] and that merger remains a solution that poses considerable risks

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[1] Special Master's Final Report, page 36.

without any sure benefits.[2] Further, the Special Master recognized that under the circumstances of this case an opportunity must be provided to make every effort to integrate before extreme solutions are considered.[3] Finally, at page 96 the Special Master found that the Southern Law Center is desegregated—unlike the LSU Law Center. The Special Master at pages 96-99 considered the merger of the two law centers and found merger inappropriate at this time.

The Court at page 7 of its July 19, 1989 Opinion and Order affirms the Special Master's ruling that this case is about desegregation. Consistent with the finding of the Special Master, at page 25, the Court found that the Southern Law Center is desegregated and, at page 26, the Court found that LSU's failure to desegregate its law school is a function of its admissions policy that makes no effort to attract black applicants.

Yet, contrary to the conclusion of the Special Master recommending against any mergers or consolidations at this time, the Court concluded that the two law schools should be merged over the next five years. Based upon the reasons discussed below, we request that the Court reconsider its order that the two law schools be merged.

1. In *Milliken* v. *Bradley*, 418 U.S. 717, 738 (1974), the Supreme Court, in reaffirming the principles established in *Swann* v. *Charlotte-Mecklenburg Board of Educaiton*, 402 U.S. 1 (1971), stated that "a federal remedial power may be exercised only on the basis of a constitutional violation and, as with any equity case, the nature of the violation determines the scope of the remedy." Citing *Swann*, 402 U.S. at 16. "Once a constitutional violation has been found, the remedy must be tailored to cure the condition that offends the Constitution."

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[2] Special Master's Final Report, page 37.

[3] Special Master's Final Report, page 38.

We believe that the constitutional violation to be remedied is the failure of LSU and the State to desegregate the LSU Law Center "and therefore we believe that the remedy [with respect to the two law schools] must be tailored to cure the condition that offends the Constitution." The record clearly establishes, and the Court found, that the "Southern Law Center is desegregated, with a student body of 58% black and 42% white and a faculty (including part-time) which is virtually 50/50." On the other hand, the LSU Center, even after operating for six years under the 1981 consent decree, "has a minuscule percentage of black students" at this time, and thus LSU —which was established for whites—continues to reflect the institution's historical white mission. Accordingly, as recommended by the Special Master, defendants should be required to desegregate the LSU Law Center.

A corollary to the principle of limiting the remedy to the wrong is that more drastic remedies should be used only if there exists no alternative. Merger is such a drastic remedy and should be utilized only if other approaches are not available. Here, other effective approaches to desegregate the LSU Law Center have not been tried; alternatives continue to exist which are less restrictive than the merger of the law schools. (See United States Proposed Plan, p. 29.) We believe that the law, as discussed above, and the record in this case—particularly the findings of the Special Master—do not support the conclusion to order an immediate merger of the two law schools. Inasmuch as both the Special Master and the Court determined that it would be appropriate to allow the new board to determine remedial measures to eliminate program duplication in all other areas, we believe that the law schools should not have been treated differently; nothing in the record justifies such different treatment. Appropriate remedies far less than merger—actually the closure of Southern law school—are available. For example, we believe that it would be appropriate for the new board to determine that two public law schools

in different places—*e.g.*, one in Baton Rouge and the other in New Orleans—would be an effective approach for eliminating the racially dual law school programs.

2. In the government's view, one of the primary issues in this case is "equal and increased access for minority students" with respect to graduate and professional programs. *Adams* v. *Richardson*, 480 F.2d 1159, 1165 (D.C. Cir. 1973); *Adams* v. *Bennett*, 675 F. Supp. 668, 678 (D.D.C. 1987). Even a cursory review of the state-operated graduate and professional programs reveals that the State's historically white institutions have failed miserably in providing such access for minority students. Specifically, the State's performance under the 1981 consent decree—under which the State made but failed to meet its affirmative commitments to increase minority access—make it dubious to rely solely on the State's efforts at traditionlly white institutions to provide this increased access for minority students. The elimination of Southern's law school—which has provided equal access for all students as a desegregated institution—is likely to be counterproductive inasmuch as it will decrease minority access. We believe that the Court should adopt the remedial approach recommended by the Special Master, who recommended that affirmative steps be taken to recruit and admit qualified students to the LSU law school, and that Southern, which has successfully desegregated its law school, assist by considering cooperative programs with LSU.

3. An equally important point is that minority students should not be made to shoulder a disproportionate share of the desegregation burden. But that is what the merger here will inevitably entail. In *Adams* v. *Bennett*, citing *Adams* v. *Califano*, 430 F. Supp. 118, 120 (D.D.C. 1977), the D.C. Circuit stated:

> The process of desegregation must not place a greater burden on Black instituitons or Black students' opportunity to receive a quality public higher education.

> The desegregation process should take into account the unequal status of the Black colleges and the real danger that desegregation will diminish higher education opportunities for Blacks. Without suggesting the answer to this complex problem, it is the responsibility of HEW [now Department of Education] to devise criteria for higher education plans which will take into account the unique importance of Black colleges and at the same time comply with the Congressional mandate.

As required by *Adams* v. *Bennett*, the Department of Education developed the Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education (Revised Criteria), 43 Fed. Reg. 6658 *et seq.* Among other things the Revised Criteria provide:

> F. The unique role of the traditionally black colleges
>
> In keeping with the instructions of the Court, the criteria recognize the unique importance of traditionally black colleges in meeting the educational needs of black students. More than 80 percent of all black college graduates have been trained at black colleges in the mid-seventies continue to graduate almost forty percent of all blacks who receive college degrees.
>
> Thus it is with good reason thta the Court of Appeals in *Adams* recognized the need to take into account "the special problems of black colleges." * * * [T]hese Black institutions currently fulfill a crucial need and will continue to play an important role in Black higher education, 480 F.2d at 1164-1165.
>
> Again in 1977, the District Court [in *Adams*] in its Second Supplemental Order, p. 4, quoted the above language of the Court of Appeals and went on to state:

> The process of desegregation must not place a greater burden on Black institutions or Black students' opportunity to receive a quality public higher education. The desegregation process should take into account the unequal status of the Black colleges and the real danger that desegregation will diminish higher education opportunities for Blacks. Without suggesting the answer to this complex problem, it is the responsibility of HEW to devise criteria for higher education desegregation plans which will take into account the unique importance of Black colleges and at the same time comply with the Congressional mandate.
>
> The Department does not take this language to mean that the traditionally black institutions are exempt from the Constitution or the requirements of Title VI. To the contrary, traditionally black and traditionally white institutions are subject to the same constitutional and congressional mandate to provide an education to all citizens without discrimination or segregation. White and black institutions are to function as part of a unitary system free of the vestiges of state imposed racial segregation. However, as the Court has instructed, the transition to a unitary system must not be accomplished by placing a disproportionate burden upon black students, faculty, or institutions or by reducing the educational opportunities currently available to blacks.

It would be ironic indeed if the end of this suit were the *diminishing* of education opportunity for minority students. Here, we believe that the Court has placed a disproportionate burden on Southern University and the students for whom Southern's law school has traditionally provided equal access.

4. Finally, the Court concluded (Order at page 27) that Southern's law school should be eliminated in large part because:

> . . . as long as the two institutions of disparate quality exist, the State will continue to produce a secondary class of lawyers unable to compete fully in the professional context. Given the racial composition of the two law schools, the negative impact of this disparity will fall largely upon the black law student population, and given the consent decree experience, a simple provision of funds will not resolve this problem, even assuming such funding is a realistic possibility.

But the record in this case shows that both Southern University and Grambling State University were established as "separate and *unequal*" components of the racially dual system, and the Special Master correctly found that "enhancement funds [for Southern University and Grambling State University] may be necessary for a variety of purposes." To allow, instead, the State to benefit from its unconstitutional action in terms of its historically treatment of Southern University is inconsistent with the law and any sense of "fair play." Desegregation should not be achieved by closing historically black institutions.

For all of the above reasons, the conclusion to eliminate the Southern University law school should be altered and the general approach recommended by the Special Master for desegregating legal education should be adopted.

B. The Court Should Reconsider Its July 19, 1989 Opinion And Order Requiring A Ten Percent Admissions Exception For Other-Race Students.

The Court's Opinion and Order requires that there be a ten percent "admissions exception" "for admitting other race students (that is, black students at PWIs and

white students at PBIs)" (slip op. 36; see also *id.* at 27). The Opinion and Order also provides later that the new board "shall set annual integration progress goals for each institution," "shall develop financial incentives for institutions that meet or exceed their annual goals," and "shall also consider employing 'reverse incentives' or taxes for institutions which consistently fail to meet their goals" (*id.* at 43). The United States strongly opposes the use of racially-preferential admissions exceptions, and a system of rewarding and punishing institutions depending on the extent to which racial goals are met. As discussed below, we do so both as a matter of constitutional law, and as a matter of sound desegregation policy.

The Supreme Court has made clear that racial preferences are highly disfavored. Such preferences are permissible only if they pass "strict scrutiny," *i.e.*, are "narrowly tailored" to a compelling governmental interest. *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706, 720-723 (1989) (plurality opinion); *id.* at 1 (Scalia, J., concurring in the judgment). That test is not met in this case. While the Court is acting pursuant to a compelling governmental interest—the remedying of past discrimination in the Louisiana higher education system—these preferences are clearly not narrowly tailored to that end.[4]

Most fundamentally, remedying the wrong in this case does not require that a racial goal be met. The Constitution does not require, either as a matter of substantive right (*Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 433-434 (1976); *Spencer* v. *Kugler*, 404 U.S. 1027 (1972)) or as a matter of remedy (*Milliken I*, 418 U.S. at 740-741; *Swann*, 402 U.S. at 24) any particular degree of racial balance even in the primary and secondary school context. It follows *a fortiori* that such

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[4] At a minimum, given the gravity of this provision, we think that the court should explain why it believes these racial preferences to be constitutionally justifiable.

a balance is not required in the higher education context, where students are not assigned to particular schools in the first place. Cf. *Bazemore* v. *Friday*, 478 U.S. 385, 408 (1986). Accordingly, a remedy that seeks to obtain such a balance cannot be said to "directly address and relate to the constitutional violation itself." *Milliken II*, 433 U.S. at 282. In those cases where the Supreme Court has upheld the use of remedial racial preferences, it did so *not* because it believed that a particular racial mix was necessary, but because it was clear that such preferences were essential to stop ongoing, "egregious" discrimination by the defendant. *United States* v. *Paradise*, 107 S. Ct. 1053 (1987); *Sheet Metal Workers* v. *EEOC*, 478 U.S. 421 (1986).[5]

The admissions exceptions also fail narrow tailoring because there are available alternative remedies and because they have an impermissible effect on innocent third parties. *United States* v. *Paradise*, 107 S. Ct. at 1073 (plurality opinion); *Sheet Metal Workers* v. *EEOC*, 478 U.S. at 475 (plurality opinion); *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 283-284 (1986) (plurality opinion) (where other "less intrusive means of accomplishing similar purposes * * * are available," a broader remedy is not narrowly tailored). If the measures proposed in the United States' plan—strong recruitment efforts, racially-neutral admissions exceptions and a scholarship policy for disadvantaged students, elimination of program duplication, and enhancement of TBIs—are undertaken, a constitutionally sufficient remedy will be in place. It is therefore unnecessary to deny a spot

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[5] In this regard, we stress that, while a state may be able to afford limited racial preferences in pursuit of a "diverse" student body, a court in the context of a desegregation suit must tie such preferences to the remedy of an underlying wrong. *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), is therefore distinguishable; in all events, the setting aside of a particular number of slots for which only members of a particular race may compete is precisely the sort of preference that *Bakke* struck down.

at Grambling for a black student because of race, or at Louisiana Tech for a white student.

The exceptions that the Court proposed are, indeed, a step backward. No one in this litigation has asserted that any college in Louisiana currently denies admission based on race.[6] The Court's new plan, however, will do precisely that. Thus, while the Court acknowledges that "the focus of this litigation is not institutions but students" (slip op. 13, citations and footnote omitted), it would limit the rights of the latter in order to achieve better numbers in the former.

Besides being unconstitutional, the racially preferential exceptions policy will undermine the goals it purports to further. The financial incentives will not only ensure that these "goals" become quotas, they will also ensure that TWIs continue to receive more state money than TBIs. The fact of the matter is that it will be much easier for TWIs to entice black students to attend them—as noted above, half already do so—than it will be for TBIs to entice white students to attend them. Thus, TWIs will find it relatively easy to receive the additional money and avoid the penalties which the Court contemplates, but the TBIs will have to run very hard to stay in the same place. We note in this regard that Southern University also opposes the exceptions policy (Special Master's Proposed Plan, at 29).

Finally, there is no better way to ensure the continuation of racial resentment and stereotyping than by requiring that TWIs accept as ten percent of their student body minority students who would not otherwise have been accepted. See, *e.g.*, T. Sowell, *Education: Assumptions Versus History* 130-152 (1986). The Court correctly acknowledges the high failure rates at Louisiana's colleges (slip op. 9), and states that it wishes neither to "damage the quality" of education nor "require any lowering of academic requirements for those students who

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[6] Indeed, the Court acknowledges that about half of Louisiana's black entering freshmen elect to attend PWIs (slip op. 13).

do gain admission" (*id.* at 41, in the context of legal education). But a ten percent exceptions requirement, coupled with "incentives" and "reverse incentives" hardening the requirement into a quota, will inevitably have this effect. This will serve neither the students nor the cause of higher education in Louisiana.

C. The Court Should Reconsider Its Order Regarding Enhancement Funding And Adopt The Recommendation Of The Special Master.

The Special Master, at pages 103-107, found that enhancement dollars must be made available, that enhancement funds should be set aside and identified, that increases in forthcoming spending should consider enhancement funds first, that a specific percentage of new funds should be designated for enhancement, and that a budget for enhancement should be established. The Special Master considered the State's "fiscal crisis" and found that, since the level of such a crisis was undetermined, all cuts and increases must be made consistent with desegregation goals.[7]

The United States submits that the Court can and should require the filing of appropriate budget information by defendants followed by appropriate evidentiary hearings, so that it can order specific funds to ensure that schools of like mission have like facilities, enabling them to have a reasonable opportunity to attract other race students. Conversely, the United States believes that the portion of the Court's order (at page 41) including non-formula expenditures for improving the quality of PBIs "whenever fiscally possible" is unclear, and allows the remedy of a constitutional violation to hinge on the violator's determination of what is "fiscally possible" to do. We further submit that the allgeed lack of funds is no basis for continuing the existence of vestiges of

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[7] Final Report, page 107.

the former unlawful dual system. Federal courts are authorized to enjoin state officials to conform their conduct to the requirements of federal law, notwithstanding a direct and substantial impact on the state treasury. *Ex Parte Young*, 209 U.S. 123 (1908); *Edelman* v. *Jordan*, 415 U.S. 651, 667 (1974); *Milliken* v. *Bradley*, 433 U.S. 267, 289 (1977).

D. The Court Should Reconsider Its Order With Respect To The Employment And Recruitment Of Other-Race Faculty, Administrators, And Professional Staff Members.

The Court's July 19, 1989 Opinion and Order does not contain clear language on defendants' obligation with respect to desegregating the faculty and the administrative and professional staffs of all institutions. Indeed, the Order merely requires that each institution "shall develop a strong, written equal opportunity policy, both as to students and employees." In our view, the Order should be amended to require explicitly that defendants desegregate the staffs and faculties of all public institutions by aggressive recruitment of other-race employees and by a nondiscriminatory assignment policy, as set out in our proposed plan (pages 20, 23-25).

E. The Court Should Clarify the Timing For the Current Board's Termination.

Finally, we request the Court to clarify the timing for disbanding the four governing boards and the creation of the single governing board. The order requires the four governing boards to cease operation in thirty (30) days and their powers to be consolidated into a single board within the thirty (30) days period. The order provides for alternatives for the creation of the single board if the Governor cannot complete appointment within the thirty days. Although the four governing boards are terminated automatically, the order is silent

concerning the identity of an entity or person having responsibility for the institutions if the four boards cease to exist in thirty days and the Governor has not appointed or the legislature has not confirmed board members within the thirty days.

F. The Monitoring Provision Should Be Reconsidered and Amended.

The Court's Order is unclear with respect to the duration of the plan. It appears that defendants are required to operate under a plan for five years, but there is no terminal date. We think it is desirable to include in the Order a mechanism for the orderly termination of this lawsuit upon the achievement of a fully desegregated system. We proposed such a mechanism in our plan (filed 1/24/89, pages 34-35).

Moreover, the procedures established for the monitoring committee do not specifically provide for any involvement by plaintiff in the monitoring process, although we do not think that this was the intention of the Court. We think it is important to ensure that any problems with compliance and achievement of the goals of the decree be identified and remedied as soon as possible, in the interest of rapid desegregation and to ensure that the remedial phase of this lawsuit not last indefinitely. In this regard, therefore we, believe that the Opinion and Order should be amended as follows:

a. The order should require the United States and other parties to review the report of the monitoring committee annually and to provide in writing to the committee and to the Court within 60 days after receiving said report any comments about progress or lack of progress in achieving desegregation.

b. If upon reviewing the annual report, the United States or any other party has concerns which it has expressed in writing, the United States, and any other party who desires to do so, shall meet with the

monitoring committee for the purpose of discussing its concerns and offering any suggestions it may have on how problems areas may be addressed. Should the United States be unable to resolve any such concerns amicably, it shall be entitled to petition the Court for the purpose of discussing said concerns with the Court and scheduling a hearing, if necessary.

CONCLUSION

Wherefore, the United States respectfully requests that the Court reconsider its Opinion and Order and alter or amend its Opinion and Order consistent with our suggestions above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing corrected version of the United States' Motion and Memorandum in Support of Motion for Reconsideration and To Alter or Amend Judgment has been sent to the following counsel by airborne courier.

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APPENDIX D

Nos. 85-93 and 85-428

In the Supreme Court of the United States

OCTOBER TERM, 1985

P. E. BAZEMORE, *et al.*,
Petitioners,
v.
WILLIAM C. FRIDAY, *et al.*

UNITED STATES OF AMERICA, *et al.*,
Petitioners,
v.
WILLIAM C. FRIDAY, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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* * * *

III. THE SERVICE RETAINS JOINT RESPONSIBILITY FOR THE SELECTION OF COUNTY CHAIRMEN, AND IS THEREFORE LIABLE UNDER TITLE VII FOR DISCRIMINATION IN THOSE SELECTIONS

The private petitioners invite this Court to consider whether Title VII permits an employer to delegate its hiring decisions to a third party which invariably acts in a discriminatory manner (85-93 Pet. 49-55). We submit, however, that this question is not properly presented here. The court of appeals concluded that the Service was not "separately responsible" for the selection of county chairment (Pet. App. 412a). It also noted, however (Pet. App. 403a), that "the agreement of the Extension Service and the County Commissioners is required in order to fill the [county chairman] vacancy." The district court explicitly so found: "all appointments are worked out jointly between the Extension Service and the [county] commissioners and no official action can be taken unilaterally by either party" (Pet. App. 77a). No party challenged this finding on appeal, and it is well supported by the record (see, *e.g.*, J.A. 163; C.A. App. 1690). The only question properly presented in this context is thus whether each participant in a joint employment decision must comply with the dictates of Title VII. It requires no extended analysis to demonstrate the fallacy of permitting each participant to avoid liability solely by showing that it shared the decision with another. *E.g.*, *Farmer* v. *ARA Services, Inc.*, 660 F.2d 1096, 1104 (6th Cir. 1981); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971); see *Atonio* v. *Wards Cove Packing Co.*, 768 F.2d 1120, 1125 (9th Cir. 1985); cf. *McDonald* v. *Sante Fe Trail Transp. Co.*, 427 U.S. 273, 284-285 (1976). It was accordingly inappropriate for the court of appeals to focus on the statistics regarding the applicants identified by

the Service for consideration for promotion, rather than on the statistics with respect to the final choices that were made.[38] In sum, a remand for reconsideration of the appropriate statistics may be warranted, but this record provides no occasion for consideration of an employer's liability for decisions made without its participation.

If the Court nevertheless reaches the issue urged by the private petitioners, we submit, for the reasons explained in our petition, that *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375 (1982), makes clear that an employer cannot properly be held vicariously liable under Title VII.

IV. PRIOR SEGREGATION IN THE 4-H AND EXTENSION HOMEMAKER CLUBS WAS FULLY CURED BY RESPONDENTS' ADOPTION OF A GENUINELY NONDISCRIMINATORY ADMISSIONS POLICY

The narrow legal question raised by private petitioners is whether a state actor has failed, as a matter of law,

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[38] See note 12, *supra*. The court did refer briefly to the ultimate success rates of black and white applicants, and determined, "[u]sing the district court's method of calculation," that the relative rates did not raise an inference of disparate treatment (Pet. App. 416a), but the court used incorrect figures in calculating those rates. The court's analysis was also flawed by its inclusion of positions for which there were no white applicants while excluding positions for which there were no black applicants; of the 5 blacks selected, only 2 were in competition with a white applicant, in each case a white female (see note 8, *supra*). In addition the court failed to take account of the fact that although the Service in the vast majority of cases recommended only a single candidate to the county, it never recommended a black candidate without also recommending a white candidate, if one was available. In each instance where both a white and black candidate were recommended, the white candidate was always selected even though the stated reason for recommending more than one candidate was that they were equally qualified (C.A. App. 914-915).

to satisfy its affirmative duty to desegregate a formerly de jure system because it retained a free choice admissions system the result of which is that some all white and all black 4-H and extension homemaker clubs continue to exist (85-93 Pet. i-ii, Question 3).[39] There is no issue in this Court concerning either the validity of the lower courts' factual conclusion that the 4-H and extension homemaker clubs have been operated in a purely nondiscriminatory manner since at least 1965, or that the respondents have taken no action designed to perpetuate the prior segregation or otherwise to have a segregative effect.[40]

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[39] The precise extent of racial mixing within the 4-H and extension clubs is unclear. Between 1972 and 1980, the total number of integrated (at least one member of a different race) 4-H Clubs in mixed communities grew from 586 to 1442, while the number of single race units in mixed communities remained fairly constant (892 in 1972; 880 in 1980) (C.A. App. 1807, 1140). Of all participants in 4-H Clubs in the state, 15.7 percent belong to these 880 one-race clubs (GX 11). As of 1972, the last year for which statistics are contained in the record, only 22 out of 1866 homemaker clubs were integrated (J.A. 103).

[40] The court of appeals found that "[t]he record is totally devoid of any proof of discrimination with respect to services provided by any 4-H or Extension Homemaker Club" (Pet. App. 424a n.128). The district court likewise found no evidence of any discrimination in services or membership (Pet. App. 165a-185a) and found that any racial imbalance existing among the clubs resulted exclusively from the wholly voluntary and unfettered choice of private individuals (Pet. App. 172a). On this basis, the district court distinguished two other cases which found segregated extension-related clubs had not been dismantled (Pet. App. 175a). Specifically, the district court noted "that the Extension Service had had a policy that all voluntary clubs be organized without regard to race and that each club certify that its membership is open to all persons regardless of race; that it instructs its agents to encourage the formation of new clubs without regard to race; that it publishes its policies in the media; that all of its club work and functions above the local community level are being conducted on a fully integrated basis; that its 4-H camps are fully integrated and have been for over ten years and that no person has been denied membership in any club on account of race" (Pet. App. 181a). The

Accordingly, we agree with the court of appeals' conclusion that the "mere existence of all white and all black 4-H and Extension Homemaker Clubs in some racially mixed communities violates neither Title VI nor the equal protection clause of the Fourteenth Amendment" (Pet. App. 424a n.128).[41] Prior decisions of this

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district court found that "[i]n working with the clubs all [Extension] agents work across racial lines" (Pet. App. 169a n.53). Although the United States and private petitioners introduced evidence that the Service had assigned agents to clubs on a racial basis until 1974 (J.A. 138-139; Tr. 1078-1079, 1994-1995, 2019-2020, 2025), they did not present the district court with a proposed finding of fact on this subject. We do not understand petitioners to argue that the court's findings were clearly erroneous, or that the Service has taken any action after the de jure period that has "serve[d] to perpetuate or re-establish the dual * * * system." *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 460 (1979). No evidence relating to the racial composition of clubs formed after the de jure period was introduced at trial, because neither the United States nor private petitioners drew any distinction between clubs formed before or after this period.

[41] The discrimination prohibited by Title VI is coextensive with that proscribed by the Constitution; our discussion will therefore address this question in terms of constitutional requirements. *Guardians* v. *Civil Service Commission*, 463 U.S. 583 (1983). The United States Department of Agriculture has promulgated regulations pursuant to Title VI which require that federal aid recipients that have "previously discriminated against persons on the ground of race, color or national origin, * * * must take affirmative action to overcome the effects of prior discrimination." 7 C.F.R. 15.3(b)(6)(i). As discussed in the text *infra*, where, as here, admissions are traditionally the product of private voluntary choice, an entity covered by Title VI has fulfilled this requirement to take affirmative action to overcome the effects of prior segregation in admissions when it has established a genuinely nondiscriminatory admissions system. Since the regulation simply embodies this statutory and constitutional requirement, the lower courts' conclusion that the Service has created such a nondiscriminatory system in the 4-H and extension homemakers clubs establishes that it is in compliance with these regulations.

The Department of Agriculture sent affirmative action "guidelines" in 1972 and 1973 to the Directors of all Extension Services

Court in the school desegration area demonstrate that a state which has insured that all its practices relating to admissions are truly race-neutral need not assure a particular racial mix [42] or eliminate personal choice in order to cure its prior segregation.

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expressing the Department's views concerning steps those Services should take with respect to desegregating 4-H and extension homemaker clubs. These guidelines, on their face, specifically exempt the respondent Extension Service from coverage because of the pendency of this litigation (Pet. App. 173a n.55; C.A. App. 1905, 1914-1958). It is also undisputed that these guidelines are, in any event, nonbinding. The stated purpose of these guidelines is to set forth standards by which Extension Services will "assure that all Extension 4-H and other youth programs * * * are provided to all clientele on a nondiscriminatory basis without regard to race, color, or national origin" (C.A. App. 1941; see also C.A. App. 1923, 1864-1865, 1888). To accomplish this goal of nondiscrimination, the guidelines state that formerly segregated Extension Services should establish "that *all reasonable efforts have been made* to recruit individuals from all racial groups represented; and reasons for individuals not desiring to become members of such clubs in interracial settings are not based upon race, color or national origin" (C.A. App. 1905 (emphasis in original)). Respondents did not institute one of the recruitment efforts specified by the Department as part of their affirmative effort to ensure nondiscrimination: personal visits by Extension staff members to potential minority participants in the clubs (C.A. App. 1910). As a general enforcement policy, the guidelines' "personal visit" standard is an appropriate and beneficial recruitment measure to assure both the Department and the covered Extension Service that all persons are aware that clubs are truly nondiscriminatory, so that the "reasons for individuals not desiring to become members of such clubs in interracial settings are not based upon race." However, this component of the Department's affirmative action program is not an absolute prerequisite to finding that the clubs are truly nondiscriminatory. The district court's findings of nondiscrimination and that any racial imbalance is solely attributable to the free choice of persons unfettered by subtle racial barriers are not clearly erroneous. For this reason, the United States did not appeal the district court's decision on this issue.

[42] Although private petitioners do not expressly state that any particular racial mix is required, their assertion that the state's efforts have "failed" (85-93 Pet. i-ii) can only be premised on the

It is well established that the Constitution does not require, either as a matter of substantive right (*e.g.*, *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 433-434 (1976); *Spencer* v. *Kugler*, 404 U.S. 1027 (1972)) or as a matter of remedy (*Milliken* v. *Bradley* (*Milliken I*), 418 U.S. 717, 740-741 (1974); *Swann* v. *Bd. of Educ.*, 402 U.S. 1, 24 (1971)), any particular degree of racial balance in a state's activities. Rather, the Constitution requires that government refrain from any action intentionally designed to exclude or segregate persons on the basis of race. *Dayton Bd. of Educ.* v. *Brinkman* (*Dayton I*), 433 U.S. 406, 413 (1977); *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). It is not disputed that the Service engaged in such deliberate segregation after this Court's decision in *Brown* v. *Bd. of Educ.* (*Brown I*), 347 U.S. 483 (1954), and thus "automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory * * * system.'" *Keyes* v. *School District No. 1*, 413 U.S. 189, 200 (1973), quoting *Brown* v. *Bd. of Educ.* (*Brown II*), 349 U.S. 294, 301 (1955).[43]

Such remedial efforts are necessary "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct" (*Milliken I*, 418 U.S. at 746) by eliminating the condition that violates the Constitution and the conditions that flow from such a violation. *Milliken* v. *Bradley* (*Milliken II*), 433 U.S. 267, 282 (1977). See *Dayton I*, 433 U.S. at 417, 420.[44] Since the condition that offends

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assumption that some degree of racial mixture is necessary for "success".

[43] It is also undisputed that it was the *state's* deliberate action that caused intentional segregation in the clubs and thus constituted "state action" governed by the Fourteenth Amendment. See *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972).

[44] Both *Milliken* cases, like other cases cited above, concerned limitations on the remedial discretion of federal courts in segrega-

the Constitution is a race-conscious admissions policy, not the absence of racial balance, the prior constitutional violation with respect to admissions is fully cured by establishing a system of admissions that "exclude[s] no [person] of a racial minority, directly or indirectly, on account of race." *Swann*, 402 U.S. at 23.[45] Accordingly, a unitary system of admissions is one "within which no person is to be effectively excluded from any [club] because of race or color." *Alexander* v. *Holmes*, 396 U.S. 19, 20 (1969). Accord, *Green* v. *School Board*, 391 U.S. 430, 432 (1968), quoting *Brown II*, 349 U.S. at 300-301 (formerly segregated school systems must " 'achieve a system of determining admission to the public schools on a nonracial basis.' "); *Brown II*, 349 U.S. at 300 ("At stake is the personal interest of the plaintiffs

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tion cases, and not what a state actor such as respondent must do in order to cure prior segregation. These cases, nevertheless, established the outermost bounds of desegregation remedial efforts because they involved the question of whether a district court has exceeded its authority by fashioning a remedy which goes beyond the "nature and extent of the * * * violation." *Milliken I*, 418 U.S. at 744. In defining the limitations on judicial remedial authority, however, these cases do not establish that every defendant must take every step a court could possibly order to cure past discrimination. For example, a district court would be authorized to require intensive affirmative recruitment efforts to cure prior discrimination. However, a state defendant that has not performed such recruitment in all particulars will nevertheless have complied with the Constitution if it arrives at the same end: nondiscriminatory admissions. (See note 41, *supra*.)

[45] Of course, a system does not become unitary in all respects simply by curing its prior discriminatory *admissions*. Rather, it must remedy all aspects of the system that have been affected by such discrimination. In the public school context this would include faculty, facilities, and the other so-called "*Green* factors." See *Green* v. *School Board*, 391 U.S. 430, 435 (1968). Our discussion is expressed in terms of admissions only because we do not understand the private petitioners to contend that the Service has not fulfilled its affirmative duty with respect to the formation of clubs or any other aspect of the clubs' programs.

in admission to public schools * * * on a nondiscriminatory basis").

To be sure, in the elementary and secondary school context, achievement of the truly race-neutral admissions scheme necessary to remedy prior segregation requires more than discontinuance of discrimination if the former unconstitutional practices have created a race-based assignment system that remains in place. Simply ending de jure segregation and returning to a neighborhood school system often will not restore the condition that would have existed absent prior segregation, and thus will not effectievly dismantle the dual system. In such school systems, student attendance districts often have been racially gerrymandered, schools may have been purposely constructed in a particular area to achieve artificial racial separation, and the location of segregated schools may well have significantly contributed to segregated residential patterns. *Swann*, 402 U.S. at 25, 28. In these circumstances, assigning students to their neighborhood school does not place students—either those who attended school during the period of de jure segregation or those who will subsequently enter the system—in the desegregated school environment (or actual school) that they would have experienced absent such prior unconstitutional actions. Accordingly, "[w]hen school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments." *Id.* at 28. To do otherwise would perpetuate the prior de jure segregation by leaving intact conditions that are directly attributable to the unconstitutional actions of state actors.

Where the state has not *assigned* persons during or after the de jure period, however, the process of disestablishing the dual system through achievement of a neutral admissions policy can be more directly accomplished. Where public officials do not assign persons to

a particular program, there is no state-controlled attendance pattern, discriminatory or otherwise, to undo or redraw. Thus, unlike elementary and secondary education, affirmative action to assure a genuine and complete termination of all discrimination in activities affecting admissions will not leave in place any discriminatory conditions caused by previous state-imposed segregation. Such a genuinely race-neutral policy will, absent any subsequent conduct that contributes to segregation, fully dismantle the dual admission system because it will restore to the victims of discriminatory conduct (and provide to others) the system mandated by the Constitution, *i.e.*, one in which each person has an equal opportunity to participate in government activities free from discrimination and racial separation attributable to state action.

This is not to say that a voluntary attendance system is unitary with respect to admissions because the state entity simply announces that it will henceforth conduct admissions without regard to race. Rather, such a formerly segregation government program is unitary only if the state has, in fact, established an admissions "system in which racial discrimination [is] eliminated root and branch." *Green*, 391 U.S. at 438. Thus, the relevant program must be free from all practices that either indicate that the program is not genuinely open to all free from subtle discrimination or that otherwise create further racial separation.

This transition will normally involve diligent oversight and remedial efforts to ensure that the defendant's existing administrative and admissions practices are not tainted by discrimination, and do not send a subtle discriminatory message, that its personnel are sensitized to the need to treat applicants and potential applicants in a wholly nondiscrimiatory manner, that its present and future practices do not have the effect of impeding desegregation, and that it is made clear to all that any prac-

tices discouraging or diminishing racial mixing are truly a thing of the past. Such affirmative action by the state will ensure that a genuinely race-neutral admissions policy has been achieved, and that any subsequent racial imbalance is thus not due to actions attributable to public officials, but to the truly free exercise of choice by private actors unaffected by subtle discriminatory exclusion.[46] Against the backdrop of recent blatant discrimination, affirmative recruitment activities in the media or otherwise will normally be an important component in this nondiscrimination effort, but the ultimate question in every case is whether the state's policies and practices are conducted in a manner that does not exclude or segregate any person on the basis of race.

In this case, as noted, the lower courts found that the respondents had fully cleansed the clubs of any such racially-based activities and that racial imbalance is solely the product of unfettered private action (see note 40, *supra*). Private petitioners do not maintain that these concurrent findings of fact are erroneous or that the respondents engaged in any action that had a segregative effect. Accordingly, for the reasons stated above, we believe the lower courts' determination that such racial discrimination had been eliminated from the sys-

---

[46] The 4-H and extension homemaker clubs are not actually a part of the Extension Service, so the precise form of respondents' affirmative remedial duty is somewhat different, although no less compelling, than a state actor that must cure its own internal practices. With respect to admissions, the respondents are obliged to take affirmative action to ensure nondiscrimination against club members by the private voluntary leaders of those clubs. For example, with respect to the sole instance of discrimination by a voluntary worker in the record, the Service promptly removed the worker and admitted the black child to the 4-H Club (Pet. App. 167a n.51). Of course, the Service must also ensure that its own actions related to these clubs—formation of clubs, recruitment of leaders, provision of services—are nondiscriminatory and are not used as devices to perpetuate segregation.

tem "root and branch" establishes that respondents had fully performed their duty to redress prior segregation.

The Service was not required to attain a particular racial mix in its system, regardless of whether private actors continued to retain the freedom to choose which, if any, club to attend. De facto segregation that is purely the product of private decision making, and thus not attributable to any action by the state, is not proscribed by the Constitution. *Dayton I*, 433 U.S. at 413. That being so, such racial imbalance need not be eliminated in order to render an admissions system fully desegregated if the government entity has established a genuinely race-neutral admissions pattern.

This Court's decision in *Spangler* makes this clear. There the district court's adoption of a student assignment plan to remedy public school segregation "established a racially neutral system of student assignment in the [school district]." 427 U.S. at 434. After the first year of this plan's implementation, free movement of persons within the district "resulted in some changes in the demographics of [the district's] residential patterns, with resultant shifts in the racial makeup of some of the schools." *Id.* at 436. "[A]s these shifts were not attributed to any segregative actions on the part of the [school district]" (*ibid.*), the racial imbalance caused by these voluntary choices of private citizens did not mean that the district had failed to perform its duty to remedy prior segregated student assignments. Consequently, the district court's requirement that the defendants engage in additional remedial admissions practices was impermissible because it enforced a right not secured by the Constitution, *i.e.*, the "'substantive * * * right [to a] particular degree of racial balance or mixing.'" *Id.* at 434, quoting *Swann*, 402 U.S. at 24. "For having once implemented a racially-neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed

its function of providing the appropriate remedy for previously racially discriminatory attendance patterns." 427 U.S. at 437.

Thus, just as the *Spangler* school board's adherence to the district court's racially neutral student assignment plan fully redressed previously segregated admissions notwithstanding a racial imbalance due to the voluntary decisions of private individuals, so too does the respondents' establishment of a nondiscriminatory system here fully remedy the prior constitutional violation regardless of whether private activities beyond their control result in an absence of racial mixing. To conclude otherwise would be to equate racial balance with effective desegregation; an equation that, as noted, *Swann* and *Spangler* expressly rejected.

This principle obtains with equal force in situations where private choice, rather than official compulsion, is the means by which attendance is determined. The holding and analysis in *Green* and its companion cases (*Raney* v. *Bd. of Educ.*, 391 U.S. 443 (1968); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968)) is limited to compulsory public education or other contexts where the government, rather than the participant, traditionally makes the decision concerning where participants in the government program will attend. Thus, *Green's* rejection of "freedom of choice" student assignment plans simply reflects the familiar rule that a system which has not yet achieved unitary status may not take steps that foster segregation where there exists a reasonably available alternative that equally or better serves the governmental purpose purportedly being furthered. And, while the "freedom of choice" plan at issue in *Green* was plainly such a segregation-inducing device, the same is not true where, as here, such private choice is the norm.

In public elementary and secondary schools, the decision whether to attend and which school to attend is virtually always made by the school district, not by the

student. Accordingly, adoption of a "free choice" or "free transfer" plan which is used or operates to perpetuate the separation of the races is impermissible, at least absent persuasive justification. Utilization of such an unusual and administratively awkward admissions scheme in preference to the traditional, more efficient mandatory assignment system creates the inference that, at a minimum, the defendant school district is not striving in good faith to establish a student attendance system that is truly free from racial considerations. In such circumstances, then, it is the school officials' abdication of their normal responsibility to assign students that causes or at least fosters segregation. Such segregation is thus directly attributable to the state, not to private actors. In short, a non-unitary school district's adoption of a "freedom of choice" plan that predictably, if not designedly, results in greater segregation than the traditional and reasonably available mandatory assignment alternative violates the district's affirmative responsibility to refrain from adopting policies that "serve to perpetuate or reestablish the dual school system" (*Columbus Bd. of Educ.* v. *Penick*, 443 U.S. at 460) in preference to less segregative and equally legitimate policies. See *Swann*, 402 U.S. at 20-21; *Columbus*, 443 U.S. at 460-462. In our view, it was precisely for this reason that the "free choice" and "free transfer" plans were struck down in *Green* and *Monroe*.

Noting that normal geographic zoning assignment was a "reasonably available" option that would greatly increase integration, the *Green* court held that a school board's preference for an attendance scheme such as "freedom of choice" "may indicate a lack of good faith; and at the least it places a heavy burden upon the Board to explain its preference for an apparently less effective method." 391 U.S. at 439. Since the use of a "free choice" plan in these circumstances clearly served no legitimate purpose particularly given the procedural and historical context in which the plan was adopted (*id.* at

432-433, 440 n.5), the school board in *Green* was unable to meet this burden. Indeed, " 'it is evident that here the Board, by separately busing Negro children across the entire county to the 'Negro' school, and the white children to the 'white' school, is deliberately maintaining a segregated system which would vanish with non-racial geographic zoning.' " 391 U.S. at 442 n.6, quoting *Bowman* v. *County School Board*, 382 F.2d 326, 332 (4th Cir. 1967) (concurring opinion).

In *Monroe*, this Court was even more explicit. In that case, the "free transfer" option allowing students to transfer after initial geographic assignment, "permitted the 'considerable number of white or Negro students in at least two of the zones to return, at the implicit invitation of the Board, to the comfortable security of the old, established discriminatory pattern * * * no attempt has been made to justify the transfer provision as a device designed to meet 'legitimate local problems'; rather, it patently operates as a device to allow *resegregation* of the races to the extent desegregation would be achieved by geographically drawn zones." 391 U.S. at 459, quoting *Goss* v. *Bd. of Educ.*, 373 U.S. 683, 689 (1983) (emphasis in original).

No such constitutional infirmity attaches to the continuance of free choice in those situations where such choice is a traditional aspect of the government program or activity. In contexts such as public parks, higher education and the 4-H Clubs here, participation or attendance in the state activity is wholly voluntary in all respects. Unlike public schools, free choice as to whether and where to attend is a normal and important feature of the system—not, as in the public elementary and secondary school context, a newly discovered device that will clearly have a segregative effect. In such cases, a transition to officially compelled assignments would constitute a fundamental alteration of the system. It would increase government regulation of private conduct by denying indi-

viduals the liberty to attend, for example, the park that is most convenient or the university best suited to their educational needs. Accordingly, preservation of the participants' traditional "free choice" cannot reasonably be viewed as an act of bad faith or a device that encourages or perpetuates segregation. To the contrary it "serve[s] important and legitimate ends." *Dayton Bd. of Educ.* v. *Brinkman* (*Dayton II*), 443 U.S. 526, 538 (1979).

Unlike the public schools in *Green* and *Monroe*, therefore, any lingering racial imbalance in the 4-H and extension homemaker clubs here is not attributable to unjustified segregation action by the government respondents, but solely to decisions freely made by private actors. That being so, neither *Green* nor *Monroe* suggests that the state has an affirmative duty in such circumstances to eliminate or restrict the discretion of private actors to achieve a greater racial balance. Nor has this Court ever suggested such a rule in any other context.[47] Indeed, in the same term that *Green* and *Monroe* were decided, this Court summarily affirmed, over dissent, a three-judge court's decision that those cases' condemnation of "freedom of choice" plans was inapposite in the higher education context because admissions there are traditionally governed by private choice. *Alabama State Teachers' Ass'n.* v. *Alabama Public School & College Authority*, 289 F. Supp. 784 (M.D. Ala. 1968), aff'd, 393 U.S. 400 (1969).[48]

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[47] For example, this Court issued a series of per curiam decisions following *Brown* which invalidated segregation in various state activities without any suggestion that the revelant public officials must do more than henceforth insure a nondiscriminatory admissions policy, *i.e.*, provide free choice. See *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U.S. 971 (1954) (parks); *Mayor of Baltimore* v. *Dawson*, 350 U.S. 877 (1955) (beaches and bathhouses); *Holmes* v. *City of Atlanta*, 350 U.S. 879 (1955) (golf courses); *Gayle* v. *Browder*, 352 U.S. 903 (1956) (public transportation).

[48] Of course, a higher education system must take affirmative remedial action not only with respect to admissions, but also, for

Thus, *Green* did not hold that the continuation of free choice is an inherent defect in a racially imbalanced system, but only that the adoption of such a scheme in the public school context is impermissible if it impedes or frustrates desegregation. Any contrary interpretation of *Green* "can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent." *Milliken I*, 418 U.S. at 747. Such an understanding of *Green* would not only read into it a requirement for "mandatory integration" which that opinion expressly rejected (391 U.S. at 437), but also would bring that decision squarely into conflict with this Court's established precedent that no particular degree of racial mixing is constitutionally required. See page 10, *supra*.

Of course, the Service undoubtedly *could* have sought to increase integration by attempting to close one-race clubs, by denying club members the opportunity to join the club of their choice or by discriminatorily excluding black and white children from clubs where their race predominates through preferential "other-race" goals and quotas. We fail to perceive, however, why such actions are in any way necessary to vindicate the constitutional rights of those persons whose unfettered access to government-supported programs is being so restricted. Where a state has unlawfully segregated railroad cars, for example, the state is not constitutionally required to compel blacks to sit in the previously all-white railroad car or to restrict access to the car formerly reserved for blacks. By the same token, so long as the Service ensured equal access to the clubs and did not engage in practices that impeded desegregation, it was not required to restrict persons' normal discretion to join the club of their choice, even if those persons exercised their unfettered choice to join a club in which their race predominates.

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example, faculty, facilities, and lingering funding disparities before it will become unitary in all respects.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed in part, affirmed in part, and remanded.

Respectfully submitted.

CHARLES FRIED
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Assistant Attorney General

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Deputy Solicitor General

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JANUARY 1986

Affidavit of Foster L. Campbell, Jr.

Member, Louisiana State Senate

Foster L. Campbell, being duly sworn, deposes and says:

1. I am a Senator of the State of Louisiana, serving since 1976, with much of my service as a member of The Senate Education Committee. This affidavit is submitted in support of Southern University Board of Supervisors' motion to stay the enforcement of the judgment entered heretofore pending the hearing of the Board's motion for anew trial and/or to alter or Amend Judgment, and the Board's alternate motion for a stay pending the hearing and determination of the Board's appeal to the United States Supreme Court or to such other court as may be appropriate.

2. The Louisiana State Senate, in its regular session, passed a resolution, which I authored, urging the Three-Judge Court in the referenced matter to permit the State Senate to appoint the membership of any single governance board the court had indicated that it might order. Twenty-one members of the Senate joined me as co-authors of the resolution and the vote on its final passage was 25 to 12, with two Senators absent. The Senate is made up of 39 members. The Resolution is attached as Exhibit F-1.

3. I authored the resolution because I feel that the system of selection of the members of a single board of higher education governance and management is a critically important matter because of the board's singularity. I believe, and almost two-thirds of the State's Senators agree, that to establish such a board solely by gubernatorial appointment is to risk disaster. The potential for undue influence, if not outright control of the entire system of public education by one man, has to be ameliorated by substituting for it an appointing authority with more diffuse power.

4. In the 1988 Regular Session of the Louisiana Legislature, I voted for a single governance board, but the measure was defeated by the Senate. While the establishment of a single governance board may well be beneficial, the method by which the board is appointed assuming that racial, geographic, and gender representation is required, is not a factor relative to the goal of desegregation. This is an educational policy matter to be decided by the Louisiana State Legislature. Not only is the goal of desegregation unaddressed by exclusive gubernatorial appointment, the potential for damage in the concentration of power over higher education in a single person is enormous. The action of the Senate in defeating the single board legislation in 1988 is attached hereto as Exhibit F-2.

5. I feel the strongest asset the Democracy has is that the power is vested in the people, not one individual. If the court's Order is implemented, the will of the people of Louisiana, as expressed through its Constitution and through the referenced resolution, would be thwarted. Material relating to the action in the people of Louisiana in adopting the State's constitutional governance board system is attached hereto as Exhibit F-3, (a), (b), (c), and (d).

6. A stay is necessary to preserve the status quo pending rehearing on appeal.

FOSTER L. CAMPBELL, JR.

Notary Public

NAYS

Messrs.—

Mr. President	McLeod
Doland	Nelson
Ewing	Poston
Hainkel	Swearingen
Kelly	

Total—9

ABSENT

Messrs.—

Bagert	Hinton
Chabert	Lauricella
Cross	

Total—5

The Chair declared that the rules were suspended.

Introduction of Resolutions,
Senate and Concurrent

Mr. Campbell asked for and obtained a suspension of the rules for the purpose of introducing and reading the following Resolutions, Senate and Concurrent, a first and second time and acting upon them as follows:

SENATE RESOLUTION No. 8—

By Mr. Fields:

A RESOLUTION

To urge and request the Committee on Senate and Governmental Affairs to study and report on Senate staff structure, personnel policies, pay plans, employment, compensation, promotion, employee functions and duties, employee grievances, and staff assignments and

the feasibility of establishing a Senate personnel committee.

Motion

Mr. Fields moved to suspend the rules for the purpose of considering the resolution at this time.

Mr. Picard objected.

ROLL CALL

The roll was called with the following result:

YEAS

Messrs.—

Bagneris
Brinkhaus
Campbell
Crain
Fields
Jefferson
Johnson
Jumonville
Landry
McLeod
McPherson
Nunez
Saunders
Sevario
Tarver
Thompson

Total—16

NAYS

Messrs.—

Mr. President
Bagert
Bankston
Decuir
Doland
Ewing
Hainkel
Hollis
Kelly
Nelson
Osterberger
Picard
Poston
Rayburn
Swearingen
Ullo
Windhorst

Total—17

ABSENT

Messrs.—

Chabert	Hinton
Cross	Lauricella
Foster	Neeson

Total—6

The Chair declared that the Senate refused to suspend the rules.

On motion of Mr. Fields, the resolution was read by title and referred to the Committee on Senate and Governmental Affairs.

SENATE RESOLUTION No. 9—

By Messrs. Campbell, McPherson, Crain, Thompson, Saunders, Picard, Brinkhaus, Decuir, Sevario, Jefferson, Tarver, Foster, Nunez, Cross, Neeson, Bagneris, Fields, Poston, Osterberger, Landry and Ullo:

A RESOLUTION

To urge and request the United States District Court of the Eastern District of Louisiana, in the event it order a single governance board, to comprise by legislative selection the membership of any single board of higher education governance in any order issued by the court in settlement, by consent or judgment, of the case of the United States v. Louisiana, Civil Action No. 80-3300, and to require the membership to be racially balanced.

Motion

Mr. Campbell moved to suspend the rules for the purpose of considering the resolution at this time.

Mr. McLeod objected.

ROLL CALL

The roll was called with the following result:

YEAS

Messrs.—

Bagneris	Landry
Brinkhaus	McPherson
Campbell	Neeson
Crain	Nunez
Cross	Osterberger
Decuir	Picard
Fields	Saunders
Foster	Sevario
Hollis	Tarver
Jefferson	Thompson
Johnson	Ullo

Total—22

NAYS

Messrs.—

Mr. President	Kelly
Bagert	McLeod
Bankston	Nelson
Doland	Poston
Ewing	Rayburn
Hainkel	Swearingen
Jumonville	Windhorst

Total—14

ABSENT

Messrs.—

Chabert	Lauricella
Hinton	

Total—3

The Chair declared that the rules were suspended.

Floor Amendments Sent Up

Mr. Brinkhaus sent up floor amendments which were read.

The resolution was read by title.

SENATE FLOOR AMENDMENTS

Amendments proposed by Mr. Brinkhaus to original Senate Resolution No. 9 by Mr. Campbell.

AMENDMENT No. 1—

On page 1, line 18, change "order" to "orders"

AMENDMENT No. 2—

On page 1, line 18, after "to" delete the remainder of the line and on line 19 delete "legislative selection" and insert "to provide for legislative appointment of"

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AMENDMENT No. 3—

On page 2, line 13, after "to" delete "comprise" and on line 19 delete "by legislative selection" and insert "to provide for legislative appointment

On motion of Mr. Brinkhaus, the amendments were adopted.

Floor Amendments Sent Up

Mr. Rayburn sent up floor amendments which were read.

SENATE FLOOR AMENDMENTS

Amendments proposed by Mr. Rayburn to original Senate Resolution No. 9 by Mr. Campbell.

AMENDMENT No. 1—

On page 1, line 17 after "To" delete "urge and request" and insert "direct"

AMENDMENT No. 2—

On page 2, line 12 after "Louisiana" delete "urges and request" and insert "directs"

Mr. Rayburn moved the adoption of the amendments. Mr. Campbell objected.

ROLL CALL

The roll was called with the following result:

YEAS

On motion of Mr. Rayburn, the amendment was withdrawn.

Under a suspension of the rules Mr. Campbell moved the adoption of the amended resolution.

ROLL CALL

The roll was called with the following result:

YEAS

Messrs.—

Bagert
Bagneris
Brinkhaus
Campbell
Crain
Cross
Decuir
Doland
Fields
Foster
Jefferson
Johnson
Jumonville
Landry
McPherson
Neeson
Nunez
Osterberger
Picard
Poston
Saunders
Sevario
Tarver
Thompson
Ullo

Total—25

NAYS

Messrs.—

Mr. President
Bankston
illegible
Lauricella
McLeod
Nelson

Hainkel	Rayburn
Hollis	Swearingen
Kelly	Windhorst

Total—12

ABSENT

Messrs.—

Bagert	Hinton

Total—2

The Chair declared the Senate had adopted the amended Senate Resolution.

Floor Amendment Sent Up

Mr. Kelly sent up a floor amendment which was read.

SENATE FLOOR AMENDMENT

Amendment proposed by Mr. Kelly to original Senate Resolution No. 9 by Mr. Campbell.

AMENDMENT No. 1—

On page 1, between lines 22 and 23 insert the following:

"Whereas the Senate is in support of the creation of single board for the governance of higher education; and

Mr. Kelly moved the adoption of the amendment.

Mr. Campbell objected.

ROLL CALL

The roll was called with the following result:

YEAS

Messrs.—

Mr. President
Bankston
Ewing
Hainkel
Hollis
Kelly
Lauricella
Nelson
Swearingen
Windhorst

Total—10

NAYS

Messrs.—

Bagert
Bagneris
Brinkhaus
Campbell
Crain
Cross
Decuir
Doland
Fields
Foster
Jefferson
Johnson
Jumonville
Landry
McPherson
Neeson
Nunez
Osterberger
Picard
Poston
Rayburn
Sevario
Tarver
Thompson
Ullo

Total—25

ABSENT

Messrs.—

Chabert
Hinton
McLeod
Saunders

Total—4

The Chair declared the amendment was rejected.

Floor Amendment Sent Up

Mr. Kelly sent up a floor amendment which was read.

SENATE FLOOR AMENDMENT

Amendment proposed by Mr. Kelly to original Senate Resolution No. 9 by Mr. Campbell.

AMENDMENT No. 1—

On page 2, between lines 19 and 20 insert the following:

"Be if further resolved that the entire record of the Senate relative to the passage of this resolution be sent to the court in addition to the copy of the resolution."

Mr. Kelly moved the adoption of the amendment.

Mr. Campbell objected.

ROLL CALL

The roll was called with the following result:

YEAS

Messrs.—

Mr. President	Kelly
Bankston	Lauricella
Ewing	Nelson
Hainkel	Swearingen
Hollis	Windhorst

Total—10

NAYS

Messrs.—

Bagert	Cross
Bagneris	Decuir
Brinkhaus	Doland
Campbell	Fields
Crain	Foster

Jefferson	Picard
Johnson	Poston
Jumonville	Rayburn
Landry	Saunders
McPherson	Sevario
Neeson	Tarver
Nunez	Thompson
Osterberger	Ullo

Total—26

ABSENT

Messrs.—

Chabert	McLeod
Hinton	

Total—3

The Chair declared the amendment was rejected.

SENATE CONCURRENT RESOLUTION No. 96—

By Mr. Hainkel:

A CONCURRENT RESOLUTION

To commend the 1989 Louisiana State University baseball team and Coach Skip Bertman and his staff on winning the Central Regional championship and advancing to the 1989 College World Series.

The resolution was read by title. Under a suspension of the rules Mr. Hainkel moved the adoption of the resolution.

ROLL CALL

The roll was called with the following result:

YEAS

Messrs.—

Mr. President	Bagneris
Bagert	Bankston

Brinkhaus	McLeod
Campbell	McPherson
Crain	Neeson
Cross	Nelson
Decuir	Nunez
Doland	Osterberger
Ewing	Picard
Fields	Poston
Foster	Rayburn
Hainkel	Saunders
Hollis	Sevario
Jefferson	Swearingen
Johnson	Tarver
Jumonville	Thompson
Kelly	Ullo
Landry	Windhorst
Lauricella	

Total—37

NAYS

Total—0

ABSENT

Messrs.—

Chabert	Hinton

Total—2

The Chair declared the Senate had adopted the Senate Concurrent Resolution and ordered it sent to the House.

Regular Order of the Day, Resumed

Senate Bills and Joint Resolutions
on Third Reading
and Final Passage, Resumed

The following Senate Bills and Joint Resolutions on third reading and final passage were taken up and acted upon as follows:

SENATE BILL No. 238—

By Mr. Bankston:

AN ACT

To amend and reenact R.S. 18:59(I), 61, 62(A), 103(A), 109 and 133(E), and to enact R.S. 18:58(E), 59.4, 61.1, and 61.2, relative to volunteer deputy registrars; to provide for their appointment, course of instruction, qualifications, and duties; and to provide for related matters.

Floor Amendments Sent Up

Mr. Nelson sent up floor amendments which were read.

SENATE FLOOR AMENDMENTS

Amendments proposed by Mr. Nelson on behalf of the Legislative Bureau to engrossed Senate Bill No. 238 by Mr. Bankston.

AMENDMENT No. 1—

On page 1, line 34, after "course" delete the comma "," and insert "and"

AMENDMENT No. 2—

On page 5, line 26, after "If" delete "the latter" and insert the following: "the appointment is revoked"

AMENDMENT No. 3—

On page 5, line 30, after "decide" insert a comma ","

AMENDMENT No. 4—

On page 6, line 10, after "registrars" insert a comma ","

AMENDMENT No. 5—

On page 6, line 13, after "registrars" delete the comma ","

AMENDMENT No. 6—

On page 7, at the beginning of line, 4, delete "registrar or deputy registrar" and insert "registrar, deputy registrar,"

AMENDMENT No. 7—

On page 7, line 5, after "register" delete the comma ","

AMENDMENT No. 8—

On page 7, line 16, before "person's" insert "the"

AMENDMENT No. 9—

On page 6, line 24, delete "and" after "voters,"

On motion of Mr. Nelson, the amendments were adopted.

Floor Amendments Sent Up

Mr. Bankston sent up floor amendments which were read.

SENATE FLOOR AMENDMENTS

Amendments proposed by Mr. Bankston to engrossed Senate Bill No. 238 by messrs. Bankston, et al.

AMENDMENT No. 1—

On page 7, line 25, after "sender" and before the quote " " " insert "; address correction requested"

SENATE BILL No. 45—

By Mr. Kelly:

A JOINT RESOLUTION

Proposing to amend Article VIII, Sections 3(A), 5, 8, and 12, to add Article VIII, Section 16, and to repeal Article VIII, Sections 6 and 7, relative to public higher and vocational-technical education; to create a Board

of Governors to govern, manage, and have budgetary responsibility for all public institutions of higher education; to provide relative to the membership, terms, and qualifications of the members of such board; to provide for their powers and duties; to transfer responsibility for vocational-technical schools from the State Board of Elementary and Secondary Education to the Board of Governors; to provide relative to appropriations for higher education; to eliminate the Board of Regents and all other boards vested with management responsibilities for higher education systems; to provide for the transfer of certain powers, property, and obligations; to specify an election date for submission of the proposition to electors and provide a ballot proposition; and to provide for related matters.

Floor Amendments Sent Up

Mr. Bares sent up floor amendments which were read.

SENATE FLOOR AMENDMENTS

Amendments proposed by Messrs. Bares, Picard and Doland to engrossed Senate Bill No. 45 by Mr. Kelly.

AMENDMENT No. 1—

On page 1, line 27, after "obligations;" insert "to provide for the transition and initial appointments;"

AMENDMENT No. 2—

On page 2, delete lines 9 through 29 and insert in lieu thereof the following:

"(B) Membership; Terms; Qualifications. (1) The board shall consist of twenty-two electors. Twenty-one members shall be appointed by the governor, subject to Senate confirmation, for overlapping terms of six years, following initial terms which shall be established by the governor. A student member shall be selected in the manner provided by law.

(2) Of the twenty-one members appointed by the governor, two shall be appointed from each congressional district and one shall be appointed from each Public Service Commission district. No member shall be appointed as representative of more than one district. The membership of the board shall reflect substantially the racial and minority characteristics of the population of the state.

(3) All hearings and actions by the Senate relative to Senate confirmation of persons appointed pursuant to this Section shall be conducted publicly.

(4) No member shall be re-appointed more than once. No member shall serve more than twelve years.

(C) Vacancy. A vacancy occurring prior to the expiration of a term shall be filled for the remainder of the unexpired term in the same manner as the original appointment."

AMENDMENT No. 3—

On page 3, between lines 31 and 32, insert the following:

"(3) To study the need for and feasibility of any new institution of post-secondary education, including branches of institutions and conversion of two-year institutions to institutions offering longer courses of study. If the creation of a new institution or the conversion of a two-year institution is proposed, the Board of Governors shall report its written findings and recommendations to the legislature within one year. Only after the report has been filed, or, after one year if no report is filed, may the legislature take affirmative action on such a proposal and then only by law enacted by two-thirds of the elected members of each house.

(4) To require that every higher education institution submit to the president of the system, at a time the Board of Governors specifies, an annual budget proposal

for its operational needs. The president shall prepare a comprehensive budget for operations and for capital construction and improvements and submit the budget of each institution, the comprehensive budget, and his budget recommendations for all institutions if higher education in the state. He shall recommend priorities for capital construction and improvements.

(5) To delegate such of its duties and powers to such officers and employees of the board and under such terms and conditions as the board determines best serves the interests of higher education.

(6) To create and provide for, within its discretion, such advisory boards as it determines is in the best interests of higher education."

AMENDMENT No. 4—

On page 4, line 16, after "Universities" change "," to "and" and after "Colleges" delete ", and Vocational-technical Schools"

AMENDMENT No. 5—

On page 4, line 18, change "The" to "In defining the role, scope, and mission for each institution, the"

AMENDMENT No. 6—

On page 4, line 20, after "University" change the dash to a period

AMENDMENT No. 7—

On page 4, line 21, after "shall be" insert "maintained as"

AMENDMENT No. 8—

On page 4, line 22, after "Louisiana" delete "and" and insert a period and on line 23, delete "shall be maintained as such."

AMENDMENT No. 9—

On page 4, delete lines 28 through 35 and on page 5, delete lines 1 through 4 and insert in lieu thereof the following:

"(B) Doctoral Granting Universities. These universities shall offer graduate programs, including doctoral degrees in areas of concentration and specialization. A broad spectrum of baccalaureate degrees shall be offered at these institutions.

(C) Comprehensive Universities. These universities shall offer graduate programs limited to the masters and specialist degree programs in their areas of specialization. A broad spectrum of baccalaureate degrees shall be offered at these institutions."

AMENDMENT No. 10—

On page 5, line 5, delete "and Vocational-Technical Training Schools" and change the dash to a period

AMENDMENT No. 11—

On page 5, delete line 6 and insert "These institutions shall have open admissions and concentrate on associate degree"

AMENDMENT No. 12—

On page 5, line 7, after "programs" change the comma to "and" and after "courses" delete ", or vocational-technical training"

AMENDMENT No. 13—

On page 5, delete lines 16 through 18

AMENDMENT No. 14—

On page 5, line 30, after "Successor" insert "; Transition; Initial Appointments"

AMENDMENT No. 15—

On page 5, line 32, after "16," insert "(A)"

AMENDMENT No. 16—

On page 6, between lines 6 and 7 insert the following:

"(B) Notwithstanding the provisions of Section 5(B) of this Article, the initial appointments to the Board of Governors shall be made as follows:

(1) Three members shall be elected from among the members of the Board of Regents existing prior to January 1, 1989 by the Senate Committee on Education and the House Committee on Education, acting jointly, upon

a favorable vote of a majority of the members thereof from each house present and voting. One such elected member shall be designated to serve a two-year term, one a four-year term, and one a six-year term. Each such member shall represent a different congressional district.

(2) Three members shall be elected from among the members of the Board of Trustees of State Colleges and Universities existing prior to January 1, 1989 by the Senate Committee on Education and the House Committee on Education, acting jointly, upon a favorable vote of a majority of the members thereof from each house present and voting. One such elected member shall be designated to serve a two-year term, one a four-year term, and one a six-year term. Each such member shall represent a different congressional district.

(3) Three members shall be elected from among the members of the Board of Supervisors of the Louisian State University and Agricultural and Mechanical College existing prior to January 1, 1989 by the Senate

Committee on Education and the House Committee on Education, acting jointly, upon a favorable vote of a majority of the members thereof from each house present and voting. One such elected member shall be designated to serve a two-year term, one a four-year term, and one a six-year term. Each such member shall represent a different congressional district.

(4) Three members shall be elected from among the members of the Board of Supervisors of the Southern University and Agricultural and Mechanical College existing prior to January 1, 1989 by the Senate Committee on Education and the House Committee on Education, acting jointly, upon a favorable vote of a majority of the members thereof from each house present and voting. One such elected member shall be designated to serve a two-year term, one a four-year term, and one a six-year term. Each such member shall represent a different congressional district.

(5) The governor shall assist the committee in order to assure that no more than two members of the Board of Governors selected in the manner provided in this Paragraph shall represent one congressional district. Following the elections by the education committees, the governor shall appoint, subject to Senate confirmation, nine members to the Board of Governors. Such appointments shall be made in a manner which results in the twenty-one initial members being representative of districts in the manner provided in Section 5 of this constitution. The governor shall designate three of his initial appointees to serve two-year terms, three to serve four-year terms, and three to serve six-year terms.

(6) Vacancies on the Board of Governors after the initial selections are made as provided in this Section shall be filled in conformance with the provisions of Section 5 of this constitution."

AMENDMENT No. 17—

On page 6, line 17, change "twenty-four" to "twenty-two"

AMENDMENT No. 18—

On page 6, line 19, after "universities;" delete the remainder of the line and delete lines 20 through 25 and insert in lieu thereof the following:

"to provide that of the twenty-one members appointed by the governor, two shall be appointed from each congressional district and one shall be appointed from each Public Service Commission district to serve overlapping six-year terms; to provide for the selection of the initial members of the board; to provide for the selection of a student member to"

Mr. Bares moved the adoption of the amendments.

Mr. Campbell objected.

ROLL CALL

The roll was called with the following result:

YEAS

Messrs.—

Mr. President
Bagert
Bagneris
Bankston
Crain
Decuir
Doland
Ewing
Foster
Hollis
Kelly
Lauricella
McLeod
Neeson
Nelson
Osterberger
Picard
Poston
Rayburn
Swearingen
Thompson
Windhorst

Total—22

NAYS

Messrs.—

Brinkhaus	Jumonville
Campbell	Landry
Chabert	McPherson
Cross	Nunez
Fields	Saunders
Hinton	Sevario
Jefferson	Tarver
Johnson	

Total—15

ABSENT

Messrs.—

Hainkel	Ullo

Total—2

The Chair declared the amendments were adopted.

Floor Amendments Sent Up

Mr. Bares sent up floor amendments which were read.

SENATE FLOOR AMENDMENTS

Amendments proposed by Mr. Bares to engrossed Senate Bill No. 45 by Mr. Kelly.

AMENDMENT No. 1—

On page 5, line 23, after "be" insert "used as provided by law and shall be"

AMENDMENT No. 2—

On page 5, line 28, after "funds" insert "in the manner provided by law"

On motion of Mr. Bares, the amendments were adopted.

Floor Amendment Sent Up

Mr. Brinkhaus sent up a floor amendment which was read.

SENATE FLOOR AMENDMENT

Amendment proposed by Mr. Brinkhaus to engrossed Senate Bill No. 45 by Mr. Kelly.

AMENDMENT No. 1—

On page 4, line 26, after "law" insert "and agriculture, including"

On motion of Mr. Brinkhaus, the amendment was adopted.

Floor Amendment Sent Up

Mr. Rayburn sent up a floor amendment which was read.

SENATE FLOOR AMENDMENT

Amendment proposed by Mr. Rayburn to engrossed Senate Bill No. 45 by Mr. Kelly.

AMENDMENT No. 1—

On page 6, between lines 6 and 7 and after Senate Floor Amendment No. 16 proposed by Mr. Bares and adopted by the Senate on June 15, 1988 add the following:

"(C) All initial appointments made to the Board of Governors, including those appointments made by the Senate Committee on Education and House Committee on Education, shall be submitted to the Senate for confirmation."

On motion of Mr. Rayburn, the amendment was adopted.

Floor Amendments Sent Up

Mr. Campbell sent up floor amendments which were read.

SENATE FLOOR AMENDMENTS

Amendments proposed by Mr. Campbell to engrossed Senate Bill No. 45 by Mr. Kelly.

AMENDMENT No. 1—

On page 2, delete lines 10 through 14 and insert in lieu thereof "twenty-one electors. Ten members shall be elected by a vote of the people, two from each Public Service Commission district; ten members shall be appointed by the governor from the state at large, subject to Senate confirmation; and one member shall be a student, selected in the manner."

AMENDMENT No. 2—

On page 2, line 15, after "except" insert "the" and change "members" to "member"

AMENDMENT No. 3—

On page 5, line 16, after "law" change "," to "." and delete the remainder of the line and delete lines 17 and 18.

AMENDMENT No. 4—

On page 6, line 17, change "twenty-four" to "twenty-one"

AMENDMENT No. 5—

On page 6, line 19, change "eight" to "ten"

AMENDMENT No. 6—

On page 6, line 20, change "one" to "two" and change "congressional" to "Public Service Commission"

AMENDMENT No. 7—

On page 6, delete line 21 and one 22, delete "congressional district" and change "five" to "ten"

AMENDMENT No. 8—

On page 6, line 23, after "and" delete the remainder of the line and insert "one member be a student,"

AMENDMENT No. 9—

On page 6, line 25, after "except" insert "the" and change "members" to "member"

AMENDMENT No. 10—

Delete Senate Floor Amendments No. 2, 14, 15, 16, and 18 proposed by Senators Bares, Picard and Doland and adopted by the Senate on June 15, 1988

Mr. Campbell moved the adoption of the amendments.

Mr. Bares objected.

ROLL CALL

The roll was called with the following result:

YEAS

Messrs.

Campbell	McPherson
Chabert	Nunez
Cross	Saunders
Jumonville	Sevario

Total—8

NAYS

Messrs.—

Mr. President	Doland
Bagert	Ewing
Bagneris	Fields
Bankston	Foster
Brinkhaus	Hainkel
Crain	Hinton
Decuir	Hollis

Jefferson	Osterberger
Johnson	Poston
Kelly	Rayburn
Landry	Swearingen
Lauricella	Tarver
McLeod	Thompson
Neeson	Ullo
Nelson	Windhorst

Total—30

ABSENT

Mr. Picard

Total—1

The Chair declared the amendments were rejected.

Floor Amendments Sent Up

Mr. Fields sent up floor amendments which were read.

SENATE FLOOR AMENDMENTS

Amendments proposed by Mr. Fields to engrossed Senate Bill No. 45 by Mr. Kelly.

AMENDMENT No. 1—

In Senate Floor Amendment No. 2 proposed by Senators Bares, Picard and Doland and adopted by the Senate on June 15, 1988, on line 2, change "twenty-two" to "twenty-four" and on line 5, change "A" to "The" and on line 5, change "member" to "members"

AMENDMENT No. 2—

Delete Amendment No. 13 proposed by Senators Bares, Picard and Doland and adopted by the Senate on June 15, 1988.

Mr. Fields moved the adoption of the amendments.

Mr. Doland objected.

ROLL CALL

The roll was called with the following result:

YEAS

Messrs.—

Bagneris
Brinkhaus
Campbell
Chabert
Doland
Fields
Jefferson
Johnson
Jumonville
Landry
McPherson
Nunez
Saunders
Sevario
Tarver

Total—15

NAYS

Messrs.—

Mr. President
Bagert
Bankston
Crain
Decuir
Ewing
Foster
Hainkel
Hinton
Hollis
Kelly
Lauricella
McLeod
Neeson
Nelson
Osterberger
Picard
Poston
Rayburn
Swearingen
Thompson
Ullo
Windhorst

Total—23

ABSENT

Mr. Cross

Total—1

The Chair declared the amendments were rejected.

Floor Amendments Sent Up

Mr. Jumonville sent up floor amendments which were read.

SENATE FLOOR AMENDMENTS

Amendments proposed by Mr. Jumonville to engrossed Senate Bill No. 45 by Mr. Kelly.

AMENDMENT No. 1—

In Senate Floor Amendment No. 2 proposed by Senators Bares, Picard and Doland and adopted by the Senate on June 15, on line 13, after "publicly." insert:

"Whether to fill an initial or succeeding full term or the unexpired portion of a term of office, the governor shall submit his appointment to the Senate for confirmation and other than for reason of death, resignation, or removal for cause, any duly appointed member of the Board of Governors shall remain in office until his successor is nominated, appointed, and confirmed by the Senate."

AMENDMENT No. 2—

In Senate Floor Amendment No. 1 proposed by Senator Rayburn and adopted by the Senate on June 15, on line 5, after "confirmation" insert "and such appointees may not begin service on the board until confirmation has occurred"

Mr. Jumonville moved the adoption of the amendments.

Mr. Bares objected.

ROLL CALL

The roll was called with the following result:

YEAS

Messrs.—

Brinkhaus
Campbell
Chabert
Cross
Foster
Jefferson
Johnson
Jumonville
McPherson
Nunez
Sevario
Tarver

Total—12

NAYS

Messrs.—

Mr. President
Bagert
Bagneris
Bankston
Crain
Decuir
Doland
Ewing
Fields
Hainkel
Hinton
Hollis
Kelly
Landry
Lauricella
McLeod
Neeson
Nelson
Osterberger
Picard
Poston
Rayburn
Saunders
Swearingen
Ullo
Windhorst

Total—26

ABSENT

Mr. Thompson

Total—1

The Chair declared the amendments were rejected.

Floor Amendments Sent Up

Mr. Landry sent up floor amendments which were read.

SENATE FLOOR AMENDMENTS

Amendments proposed by Mr. Landry to engrossed Senate Bill No. 45 by Mr. Kelly.

AMENDMENT No. 1—

In Senate Floor Amendment No. 2 proposed by Senator Bares, et al. and adopted by the Senate on June 15, 1988, on line 2, change "twenty-two" to "twenty-three" and on line 5 change "A" to "Two" and change "member" to "members"

AMENDMENT No. 2—

Delete Senate Floor Amendment No. 13 proposed by Senator Bares, et al. and adopted by the Senate on June 15, 1988."

AMENDMENT No. 3—

On page 5, line 16, after "law" delete the remainder of the line and delete lines 17 and 18 and insert a period ".".

Mr. Landry moved the adoption of the amendments.

Mr. Doland objected.

ROLL CALL

The roll was called with the following result:

YEAS

Messrs.—

Bagneris	Jumonville
Brinkhaus	Landry
Campbell	McPherson
Chabert	Nunez
Fields	Saunders
Jefferson	Sevario
Johnson	Tarver

Total—14

NAYS

Messrs.—

Mr. President	Bankston
Bagert	Crain

Cross	Neeson
Decuir	Nelson
Doland	Osterberger
Ewing	Picard
Foster	Poston
Hainkel	Rayburn
Hinton	Swearingen
Hollis	Thompson
Kelly	Ullo
Lauricella	Windhorst
McLeod	

Total—25

ABSENT

Total—0

The Chair declared the amendments were rejected.

Floor Amendment Sent Up

Mr. Bares sent up a floor amendment which was read.

SENATE FLOOR AMENDMENT

Amendment proposed by Mr. Bares to engrossed Senate Bill No. 45 by Mr. Kelly.

AMENDMENT No. 1—

In Senate Floor Amendment No. 2 proposed by Senators Bares, Picard, and Doland and adopted by the Senate June 15, 1988, on line 17, after the word "term" delete the remainder of the line and delete line 18 and insert:

"by appointment by the governor, subject to Senate confirmation." "

Mr. Bares moved the adoption of the amendment.

Mr. Fields objected.

ROLL CALL

The roll was called with the following result:

YEAS

Messrs.—

Mr. President
Bagert
Bankston
Campbell
Chabert
Crain
Cross
Decuir
Doland
Ewing
Foster
Hainkel
Hinton
Hollis
Johnson
Kelly
McLeod
Neeson
Nelson
Osterberger
Picard
Poston
Rayburn
Saunders
Sevario
Swearingen
Thompson
Ullo
Windhorst

Total—29

NAYS

Messrs.—

Bagneris
Brinkhaus
Fields
Jefferson
Jumonville
Landry
McPherson
Nunez
Tarver

Total—9

ABSENT

Mr. Lauricella

Total—1

The Chair declared the amendment was adopted.

The bill was read by title. Mr. Bares moved the final passage of the amended bill.

ROLL CALL

The roll was called with the following result:

YEAS

Messrs.—

Mr. President
Bagert
Bankston
Campbell
Crain
Decuir
Doland
Ewing
Hainkel
Hinton
Hollis
Kelly
Lauricella
McLeod
Neeson
Nelson
Osterberger
Picard
Poston
Rayburn
Swearingen
Thompson
Ullo
Windhorst

Total—24

NAYS

Messrs.—

Bagneris
Brinkhaus
Chabert
Cross
Fields
Foster
Jefferson
Johnson
Jumonville
Landry
McPherson
Nunez
Saunders
Sevario
Tarver

Total—15

ABSENT

Total—0

The Chair declared the amended bill failed to pass.

Notice of Reconsideration

Mr. Barnes, pursuant to Senate Rule Number 11; 12, gave notice that before the expiration of the Morning Hour of the next succeeding legislative day of the Senate, he would move to reconsider the vote by which the bill failed to pass.

Rules Suspended

Mr. Sevario asked for and obtained a suspension of the rules for the purpose of advancing to the order of House Bills on Third Reading and Final Passage and calling House Bill No. 710 out of its regular order

House Bills and Joint Resolutions
on Third Reading
and Final Passage

The following House Bills and Joint Resolutions on third reading and final passage were taken up and acted upon as follows:

HOUSE BILL No. 710—

By Representatives Diez and Carrier and Senators Sevario and Cross:

AN ACT

To amend and reenact R.S. 33:2740.6(A) and (B)(1), relative to special taxing districts in Livingston Parish; to ratify creation of Special Sales Tax District Number Two and to proivde that the boundaries of said district may overlap other such special taxing districts; to increase the maximum rate of sales and use tax which may be levied within any such district; to provide that the tax rate authorized for any such district plus the rate for any such overlapping district shall not exceed such maximum rate; and to provide for related matters.

The bill was read by title. Mr. Sevarino moved the final passage of the bill.

ROLL CALL

The roll was called with the following result:

YEAS

Messrs.—

Mr. President
Bagert
Bagneris
Bankston
Brinkhaus
Campbell
Chabert
Crain
Cross
Decuir
Doland
Ewing
Fields
Foster
Hainkel
Hinton
Hollis
Jefferson
Johnson
Jumonville
Kelly
Landry
Lauricella
McPherson
Neeson
Nelson
Nunez
Osterberger
Picard
Poston
Rayburn
Saunders
Sevario
Swearingen
Tarver
Thompson
Ullo
Windhorst

Total—38

NAYS

Total—0

ABSENT

Mr. McLeod

Total—1

The Chair declared the bill was passed. The title was read and adopted. Mr. Sevario moved to reconsider the vote by which the bill was passed and laid the motion on the table.

Regular Order of the Day, Resumed

Senate Bills and Joint Resolutions
Returned from the House of
Representatives with Amendments

The following Senate Bills and Joint Resolutions returned from the House of Representatives with amendments were taken up and acted upon as follows:

EXHIBIT G

STATEMENT OF JOHNNY JACKSON, JR.

I am Johnny Jackson, Jr. I am currently a member of the New Orleans City Council. Prior to that, I served as a State Representative for the State of Louisiana. In 1973, I was a delegate to the Louisiana Constitutional Convention. As a delegate, I authorized and proposed an amendment that provided for the creation of the Southern University Board of Supervisors and required it to be placed in the State Constitution.

I felt there was a need for Southern University to have its own governing board because of the history of discrimination that the institution had experienced. The amendment had the support of an overwhelming majority of the black delegates at the constitutional convention. It subsequently earned the overwhelming support of the state's black voters for its adoption.

The reason for this board was that the university needed a vehicle of governance to address the peculiar needs of its student population, which needs had not been addressed prior to that time. To do away with the Southern University Board at this time would mean that those peculiar needs would again go unaddressed, that the purality and diversity of opinion in higher education would be lost, and that the voice for equality in advocacy for the various interests that make up our state would be effectively silenced. As a graduate of Southern University at New Orleans (SUNO), an active alumnus, and an elected official, I can appreciate the role that SUNO plays with the City of New Orleans and the State of Louisiana. Talks of merger of SUNO with another institution, or downgrading it to a community or junior college have caused great concern for me and many of my present and past constituents. The occurrence of either of these would result in a serious loss to this city and this state.

EXHIBIT A

Affidavit of Joe A. Terrell, Chairman,
Southern University Board of Supervisors

Joe A. Terrell, being duly sworn, deposes and says:

1. I am the Chairman of the Board of the Southern University Board of Supervisors. This affidavit is submitted in support of defendant Southern University Board of Supervisors' motion to stay the enforcement of the judgment entered heretofore pending the hearing of the Board's motion for a new trial and/or to alter or amend judgment, and the Board's alternate motion for a stay pending the hearing and determination of the Board's appeal to the United States Supreme Court or such other court as may be appropriate.

2. Under pertinent provisions of the Constitution of the State of Louisiana, the Southern University Board of Supervisors is charged with the responsibility for managing the institutions making up the Southern University System. These are Southern University and A&M College, Southern University at New Orleans, Southern University Shreveport-Bossier, and the only historically black professional school in the state, the Southern University Law Center. Between these four institutions and including the systems' staff, the Southern University Board of Supervisors has responsibility for managing a system consisting of over 13,000 students, and nearly 1800 faculty and staff, in addition to a large physical plant. Thus, the Southern University System comprises the largest system of historically black colleges in the nation.

3. Southern University has undertaken a unique role and responsibility to educate minority and disadvantaged students through special developmental education programs and otherwise in order to increase the number of qualified baccalaureate degree-holding minority and disadvantaged persons in our nation. At the same time, it has attempted to expand its offerings to programs

attractive to black and white students regardless of economic or social backgrounds. In connection with this role, it has developed unique administrative and faculty approaches to the needs of students and to the needs of the citizens of the State of Louisiana, which affords it a special place as a voice in higher education governance for integration and for protection and advocacy of the interest of the students it serves.

4. It would be administratively and programmatically impossible to disband the Southern board and to reestablish it again depending on the outcome of the Board's motion for a new trial and/or to alter or amend judgment of Motion for Stay pending appeal of said judgment.

5. It would also be imposible as a practical matter to recapture the loss of productive capacity of the unique management and administrative expertise developed by the Southern University Board over the years and provided to its students and to others served by it during the pendency of defendant's motions and the pendency of any appeal taken respecting the court's judgment.

6. Should Southern University and A&M College be required to undertake selective admissions as a part of its move to doctoral status over a period of three years from the date of entry of judgment, it will have to change drastically its admissions policies and other related policies at a rate that will be destructive of its unique role and mission pending the outcome of defendant's motion for a new trial and/or to alter or amend the judgment or Motion for Stay pending appeal of said judgment.

7. Should the court's order take effect within the ordinary delays permitted by law, the Southern University Law Center will be unable to attract students or retain faculty or staff due to the then impending elimination of the law school or pending the outcome of defendant's motions or an appeal of the judgment herein.

8. The Southern University Law Center, since 1963, has graduated more than 1,088 lawyers, of whom 789

(72.5%) have passed the Louisiana State Bar, rendering it among the major producers of black lawyers in the nation. In the absence of the continued and unthreatened operation of the law school during the pendency of the defendant's motion and appeal, the productive capacity of the Southern Law School would be severely affected.

9. The overall harm that will be suffered by each of the institutions of Southern University and the students who now attend the university and who may desire to attend it in the future, as well as similarly situated faculty and staff, would be irrevocable should the Southern University Law Center be merged into the Louisiana State University Law Center or if significant and dispositive actions are taken along that path, inasmuch these steps cannot be reversed.

10. Should a comunity college system be instituted or undertaken to be instituted in Baton Rouge during the pendency of defendant's motions or pending appeal of said judgment, irreversible and irreparable harm would be done to the opportunity for many disadvantaged students to receive a baccalaureate or professional degree in the State of Louisiana as well as Southern University and A&M College's opportunity to attract other-race students.

11. A stay is necesary to preserve the status quo pending rehearing or appeal.

12. Overall, if a stay is not granted, irreparable harm will result to students now attending the University or who may desire to attend, and similarly situated faculty and staff.

/s/ Joe A. Terrell
JOE A. TERRELL
Chairman
Southern University
Board of Supervisors

/s/ [Illegible]
Notary Public

LOUISIANA STATE BAR ASSOCIATION INFORMATION ON SOUTHERN UNIVERSITY LAW GRADUATES

Year	Graduates Number	Applicants	Number Admitted To Bar
1963	5	4	4(100%)
1964	0	0	
1965	3	2	2(100%)
1966	5	4	4(100%)
1967	1	1	1(100%)
1968	4	3	3(100%)
1969	7	7	7(100%)
1970	12	11	9(82%)
1971	9	9	6(67%)
1972	20M 2D	17	14(82%)
1973	16	15	11(73%)
1974	35	24	18(75%)
1975	47	31	27(87%)
1976	32M 2D	34	27(79%)
1977	36M 5D	35	34(97%)
1978	38M 6D	28	25(89%)
1979	51M 2D	44	38(86%)
1980	50	43	37(86%)
1981	60M 13D	54	51(94%)
1982	54M 8D	52	49(94%)
1983	63M 7D	52	52(100%)
1984	91	74	70(95%)
1985	82M 8D	72	69(96%)
1986	100M 7D	91	86(94%)
1987	102	88	73(83%)
1988	100M 5D	90	72(80%)
Total	1088	885	789(89%)

[4110-12]

REVISED CRITERIA SPECIFYING THE INGREDIENTS OF ACCEPTABLE PLANS TO DESEGREGATE STATE SYSTEMS OF PUBLIC HIGHER EDUCATION

In late 1969 and early 1970, the Department of Health, Education, and Welfare (HEW) notified ten states that they had not dismantled their statewide dual systems of public higher education. The letters sent by HEW at that time advised each state of its failure to adopt measures necessary to overcome the effects of past segregation and notified the states of their obligation to file a statewide plan for the desegregation of their public systems of higher education.

For the past seven years the Court reviewed HEW's efforts to desegregate these systems of higher education. In 1977, this Court found that the Department's effort had not been adequate and ordered the Department to require six of the original ten states to submit new desegregation plans and to set specific standards for those plans.

The Court found that "specific commitments (were) necessary for a workable higher education desegregation plan . . . concerning admission, recruitment and retention of students, concerning the placement and duplication of program offerings among institutions, the role and the enhancement of black institutions, and concerning changes in the racial composition of the faculties involved.

Specifically, this Court entered a Second Supplemental Order on April 1, 1977 directing the Department to transmit to the six states of Arkansas, Florida, Georgia, North Carolina, Oklahoma, and Virginia as well as the Court and the plaintiffs criteria specifying the ingredients of acceptable desegregation plans for their institutions of public higher education. Accordingly, on July 5,

1977, the Department published criteria which were amended one month later to take into account suggestions offered by some of the states.

The Court further directed that HEW require each state to submit, within 60 days of receipt of the criteria, a revised desegregation plan and to accept or reject such plans within 120 days thereafter. In September 1977, in response to HEW's request, the six states submitted desegregation plans. After months of intensive negotiations, the Department announced on February 2, 1978, that it was accepting the plans of Arkansas, Florida, and Oklahoma and not accepting plans submitted by Georgia, North Carolina, and Virginia. On the same date, the Department announced thae it would publish in the FEDERAL REGISTER, revised criteria which are substantially similar to the criteria published in July.

Where HEW has found that a state has not eliminated the remaining vestiges of segregation in its formerly dual system of public higher education, and is, therefore, in violation of Title VI of the Civil Rights Act of 1964, it is required first to attempt to secure compliance by voluntary means. When those effores fail, HEW is required to seek enforcement either administratively or through the courts. 42 U.S.C. 200-1; 45 CFR 200d-1, 45 CFR 80.7(d)(1), 80.8. These revised criteria are issued to assist such states in the preparation of desegregation plans as part of the process of securing voluntary compliance.

HEW originally developed the criteria mindful of the instructions of the Court that they comply with constitutional standards and Title VI, conform with sound educational practices, and take into account the unique importance of black colleges. Based on its experience in applying the criteria to six state systems of higher education over the past months, HEW has determined that the criteria provide specific and effective guidance to the states and at the same time, are sufficiently flexi-

ble to provide for circumstances which may vary from state to state.

PREAMBLE

I. HISTORY OF LEGAL PROCEEDINGS

The criteria set forth below initially were developed by the Department of Health, Education, and Welfare (HEW) pursuant to the specific direction of the United States District Court for the District of Columbia in *Adams* v. *Califano*, Civil Action No. 3095-70, Second Supplemental Order (D.D.C. April 1, 1977). The Court's Order arose from a lawsuit initiated in 1970 to require HEW to take action to enforce the provisions of Title VI of the Civil Rights Act of 1964.[1]

In 1969, the Office for Civil Rights (OCR) determined that ten States[2] were continuing to operate segregated higher education systems in violation of Title VI of the 1964 Civil Rights Act. Although the States were notified of this finding and were requested to submit corrective plans, no administrative enforcement actions were taken when the States failed to submit plans or submitted plans unacceptable to HEW. In February 1973, the *Adams* litigation resulted in a ruling requiring that HEW take appropriate enforcement action. *Adams* v. *Richardson*, 356 F.Supp. 92 (D.D.C. 1973). That ruling was unanimously affirmed by the full United States Court of Appeals for the District of Columbia Circuit, although the Court of Appeals modified the District Court's order and directed HEW to attempt to secure acceptable desegrega-

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[1] Title VI of the Civil Rights Act of 1964 provides: "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. 2000d.

[2] Arkansas, Florida, Georgia, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania, and Virginia.

tion plans from the ten States before commencing enforcement proceedings. *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973).

In 1974, HEW accepted desegregation plans from eight of the ten States[3] Reports covering the first year of implementation were submitted to HEW in 1975. Subsequently, the plaintiffs in the *Adams* case sought further relief and on April 1, 1977, the Court ruled that the 1974 plans did not comply with the criteria previously announced by HEW and that as implemented the plans had failed to achieve significant progress toward higher education desegregation. Based on these findings, the Court ordered HEW to develop and issue within 90 days specific criteria to guide the six States[4] in the preparation of revised desegregation plans.

II. LEGAL AND EDUCATIONAL PRINCIPLES

A. *De jure segregation*

These criteria will be applied to a state which formerly operated a dual system of public higher education under state law, if the Office for Civil Rights determines after investigation that the state has failed to remove the vestiges of racial segregation in its system in violation of Title VI.

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[3] Louisiana refused to submit a plan and was referred to the Department of Justice, which filed a lawsuit, (*United States* v. *Lousiana*), Civil Action No. 74-68 (M.D. La.) in January 1974. The plan submitted by Mississippi was deemed unacceptable by HEW and the matter was referred to the Department of Justice, which filed a lawsuit, *Ayers* and *United States* v. *Finch*, Civil Action No. D.S. 75-9-K (N.D. Miss.), in March 1975.

[4] The April 1, 1977, Order excludes Pennsylvania (by agreement of the parties to the *Adams* lawsuit) and Maryland, which commenced a separate injunctive suit againsht HEW's enforcement proceedings now pending in the United States Court of Appeals for the Fourth Circuit (*Mandel* v. *HEW*, No. 76-1494), as well as Louisiana and Mississippi.

B. *Affirmative duty to take effective steps to eliminate de jure segregation*

Where there has been past de jure segregation, states are required to take affirmative remedial steps and to achieve results in overcoming the effects of prior discrimination. HEW's regulation implementing Title VI provides that

> In administering a program regarding which the recipient has previously discriminated against persons on the ground of race * * *, the recipient must take affirmative action to overcome the effects of prior discrimination. 45 CFR 30.3(b) (6) (i).

The 14th Amendment also calls for more than mere abandonment of discrimination through the state's adoption of passive or neutral policies. The United States Supreme Court has held that public school officials have "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which discrimination would be eliminated root and branch." *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 437-38 (1968).

The affirmative duty to desegregate applies with equal force to higher education. *Norris* v. *State Council of Higher Education*, 327 F. Supp. 1368 (E.D. Va. 1971), *aff'd per curiam*, 404 U.S. 907 (1971); *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd* 369 U.S. 215 (1967); *Geier* v. *Dunn*, 337 F. Supp. 573 (M.D. Tenn. 1972). Additionally, the Supreme Court has made it clear that desegregation plans are not adequate unless they are effective. *See Green* v. *County School Board of New Kent County, supra; Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

Consistent with the requirements of Title VI these criteria set forth the elements of a desegregation plan which would eliminate the effects of past discrimination.

C. *Statewide approach*

The Court of Appeals in its en banc opinion in *Adams* directed HEW to undertake a statewide approach and noted the serious problem created by the lack of viable statewide coordinated planning in higher education:

> The problem of integrating higher education must be dealt with on a statewide rather than a school-by-school basis.[10]

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[10] It is important to note that we are not here discussing discriminatory admission policies of individual institutions. To the extent that such practices are discovered, immediate corrective action is required, but we do not understand HEW to dispute that point. This controversy concerns the more complex problem of systemwide racial imbalance. *Adams* v. *Richardson, supra,* 480 F.2d at 1164-1165 (footnote in original).

The Department has followed this approach since 1969 because we believe statewide planning is consistent with sound educational policy. Thus, these criteria require not only that each institution pursue nondiscriminatory student admission and faculty and staff employment practices, but also that the state system as a whole develop a comprehensive and coordinated statewide desegregation plan embodying those specific affirmative, remedial steps which will prove effective in achieving significant progress toward the disestablishment of the structure of the dual system and which address the problem of "systemwide racial imbalance."

D. *Specificity—goals and timetables*

The District Court in *Adams* concluded that the plans previously adopted by the states had failed to achieve adequate desegregation progress and lacked specific commitments for change as concerns the desegregation of student bodies and faculties, enhancement of traditionally black institutions, and desegregation of the governing boards in higher education systems.

The District Court directed HEW to prepare criteria which would identify for the states the specific elements to be included in their revised desegregation plans. As the District Court stated in response to plaintiffs' oral argument on January 17, 1977:

> What I do want them to do though is be under the compulsion of a court order to submit to the states certain *specific* requirements which the states must respond to and they should be given a timetable for communicating with the states, and the states should be given some kind of timetable within which to make response. (Transcript, January 17th ruling; emphasis supplied.)

In *Geier* v. *Blanton*, 427 F. Supp. 644 (M.D. Tenn. 1977), the Court quoted its Order of December 23, 1969, expressing its dissatisfaction with a state submitted desegregation plan in that the plan as submitted "lacks specificity, in that there is no showing of funds to be expended, no statement of the number of students to be involved, and most importantly, no time schedules for either the implementation of the projects or the achievement or any goals." 427 F. Supp. at 646.

The Supreme Court has maintained that in a system with a history of segregation there is a need for remedial criteria of sufficient specificity to assure compliance with the law. See *Swann*, supra at 25-26.

In keeping with the Court's view that the Department should submit specific requirements to the states, numerical goals and timetables are set forth in the criteria. The goals are established as indices by which to measure progress toward the objective of eliminating the effects of unconstitutional de jure racial segregation and of providing equal educational opportunity for all citizens of these states. They are benchmarks and provide the states the clear and specific guidance called for by the Court.

These goals are not quotas. The Department is opposed to arbitrary quotas. Failure to achieve a goal is not sufficient evidence, standing alone, to establish a violation of Title VI. In addition, the Office for Civil Rights upon a showing of exceptional hardship or special circumstances by a state, may modify the goals and timetables. Nevertheless, the states are under a statutory obligation to devise and implement plans that are effective in achieving the desegregation of the system.

Most importantly, under these criteria and the goals they set, all applicants must be able to compete successfully. States' efforts under these criteria need not and should not lead to lowering academic standards. States may need to innovate in seeking out talented students who will profit from higher education. They may need to broaden definitions of potential; to discount the effects of early disadvantage on the development of academic competence; and to broaden the talents measured in admissions tests. But new and different yardsticks for measuring potential are not lower standards. They can be more valid measures of true potential and talent, taken as a whole, these criteria seek to preserve and protect academic standards of excellence.

E. *Special considerations in developing criteria for desegregation in higher education*

A state system of higher education, as with an elementary and secondary school district, is held to an affirmative duty to take remedial action to correct past practices of segregation and discrimination. However, the nature of the remedial action required of a higher education system will differ from that required of a local education district. The court of Appeals in *Adams* noted:

> However, we are also mindful that desegregation problems in colleges and universities differ widely from those in elementary and secondary schools, and that HEW admittedly lacks experience in dealing

> with them. * * * As regrettable as these revelations are, the stark truth is that HEW must carefully access the significance of a variety of new factors as it moves into an unaccustomed area. 480 F.2d at 1164.

In *Norris* v. *State Council of Higher Education*, 327 F. Supp. 1368, 1373 (E.D. Va. 1971), aff'd per curiam, 404 U.S. 907 (1971), the court held:

> The means of eliminating discrimination in public schools necessarily differ from its elimination in colleges, but the state's duty is as exacting.

And in *Sanders* v. *Ellington*, 288 F. Supp. 937, 943 (M.D. Tenn. 1968), the court stated:

> Now in considering the time element for presentation of a plan, I have thought of the complexities of the problem. I recognize that the simple remedies which might be available to a county school board where there is involved a compulsory system of education, a free system of education, and assignment of students, are not available here. Colleges are not compulsory and everyone can testify that they're not free.

Higher education differs from elementary and secondary education in many other ways. Besides being voluntary rather than compulsory, higher education operates on a statewide or regional basis, not local; there are no "attendance zones" in higher education; higher education programs vary from institution to institution and are not uniform; students are free to leave the state or to attend private colleges in pursuit of a higher education.

Furthermore, from state to state significant differences are to be found and must be taken into consideration. In some states strong centralized "system" exists including four year and two year institutions; in others, the four year and two year institutions report to separate boards;

in yet others, each institution operates under its own independent board. While none of these differences relieves a state of its obligations under Title VI or its constitutional duties, they must be taken into account in fashioning an appropriate set of criteria to be applicable to six states.

Accordingly, while desegregation cases involving individual elementary and secondary school districts are a guide to a state's duty to take corrective action, they are not dispositive of the particular methods to be designed for the dismantling of a dual system of higher education, for the desegregation of a statewide system, for the removal of the vestiges of racial segregation, and for the correction of "systemwide racial imbalance." As the courts in *Adams* have noted, these are indeed "complex issues. These criteria are designed specifically for the higher education systems of these six states based on a careful consideration of relevant statutes and court opinions and with due consideration to the unique characteristics of higher education.[5]

F. *The unique role of the traditionally black colleges*

In keeping with the instructions of the Court, the criteria recognize the unique importance of traditionally black colleges in meeting the educational needs of black students. More than 80 percent of all black college graduates have been trained at[6] black colleges. In the mid-seventies, black colleges continue to graduate almost forty percent of all blacks who receive[7] college degrees.

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[5] For a useful discussion of these issues see Note, "The Affirmative Duty To Integrate Higher Education," 70 *Yale Law Journal* 666 (1970).

[6] See Elias Blake, Public Policy and the Higher Education of Black Americans." Staff Report, Subcommittee on Constitutional Rights of the Committee on the Judiciary, 94th Cong., 2d Sess. 1976.

[7] National Center for Education Statistics, Earned Degrees Survey, 1975-76.

Thus it is with good reason that the Court of Appeals in *Adams* recognized the need to take into account "the special problems of black colleges."

> Perhaps the most serious problem in this area is the lack of state-wide planning to provide more and better trained minority group doctors, lawyers, engineers and other professionals. A predicate for minority access to quality post-graduate programs is viable, co-ordinated state-wide higher education policy that takes into account the special problems of minority students and of Black colleges. * * * (T)hese Black institutions currently fulfill a crucial need and will continue to play an important role in Black higher education. 480 F.2d at 1164-1165.

Again in 1977, the District Court in its Second Supplemental Order, p. 4, quoted the above language of the Court of Appeals and went on to state:

> The process of desegregation must not place a greater burden on Black institutions or Black students' opportunity to receive a quality public higher education. The desegregation process should take into account the unequal status of the Black colleges and the real danger that desegregation will diminish higher education opportunities for Blacks. Without suggesting the answer to this complex problem, it is the responsibility of HEW to devise criteria for higher education desegregation plans which will take into account the unique importance of Black colleges and at the same time comply with the Congressional mandate.

The Department does not take this language to mean that the traditionally black institutions are exempt from the Constitution or the requirements of Title VI. To the contrary, traditionally black and traditionally white institutions are subject to the same constitutional and congressional mandate to provide an education to all citizens

without discrimination or segregation. White and black institutions are to function as part of a unitary system free of the vestiges of state imposed racial segregation. However, as the Court has instructed, the transition to a unitary system must not be accomplished by placing a disproportionate burden upon black students, faculty, or institutions or by reducing the educational opportunities currently available to blacks.

To achieve the objectives of Title VI, precise methods will need to be fashioned for institutions within a state, each appropriate to the task of overcoming the effects of prior discrimination in the particular instance. Each method will be enforced with equal force and determination. Each method is designed to achieve the same constitutional standard.

III. CONSULTATION PROCESS

In the preparation of the criteria originally promulgated pursuant to court instruction, the Department undertook an extensive consultation process within the Department and with interested outside parties. In an effort to assure that these criteria were both legally and educationally sound, a departmental task force was established to guide their development. The task force combined the multiple disciplines and varied expertise needed to resolve the complex issues and educational policies involved in this desegregation process. Serving on the task force were the General Counsel, the Director of the Office for Civil Rights, the Assistant Secretary for Education, the Commissioner of Education, and the Assistant Secretary for Planning and Evaluation.

The Department also embarked on a program of open dialogue and consultation with parties of interest. The task force members conferred with representatives of the six states collectively and individually. The representatives included college presidents, education officials, and aides to Governors. A special meeting was held with stu-

dents who attend the public colleges in the six states and representatives of several national student organizations. Four meetings were held with officials of the amicus curiae, National Association for Equal Opportunity in Higher Education, an association of the presidents of 110 predominantly black colleges and universities, both state supported and private. Two panels of nationally recognized educators met for half day sessions to advise the Department.

Finally, plaintiffs' representatives devoted many hours to reviewing and commenting on drafts of the criteria. They also convened a meeting for the Department with 28 citizens from these six states who are most familiar with the higher education desegregation efforts in their respective states.

The Department assumes full and sole responsibility for the content of these criteria. The consultations enumerated above were exceedingly helpful to the Department in the preparation of these criteria, but these discussions do not imply concurrence in the criteria in whole or in part by other parties.

Higher educational systems in these and other states are undergoing difficult adjustments caused by fiscal and demographic trends beyond the control of individual states. Accordingly, the criteria developed for the six states under the *Adams* Order, focused on desegregation efforts to be undertaken within the next five years. Similarly, OCR will seek plans that contain five-year goals from other states which are found to have a duty to eliminate the vestiges of duality in their systems of higher education.

As each state attains the goals set forth in its plan, OCR will assess, in cooperation with that state, the progress thereby made in order to determine what additional steps, if any, are necessary to complete the desegregation process. Furthermore, OCR will periodically review these

criteria to assure their adequacy in meeting constitutional requirements, their consistency with rulings of the courts in higher education desegregation, and the mandate of Title VI.

ELEMENTS OF A PLAN

I. DISESTABLISHMENT OF THE STRUCTURE OF THE DUAL SYSTEM

An acceptable plan shall commit the state to the goal of organizing and operating the system and institutions of higher education in a manner that promises realistically to overcome the effects of past discrimination and to disestablish the dual system, and which assures that students will be attracted to each institution on the basis of educational programs and opportunities uninhibited by past practices of segregation.

To achieve the disestablishment of the structure of the dual system, each plan shall:

A. *Define the mission of each institution within the state system on a basis other than race.*

Each mission statement shall include at a minimum:

1. The level, range and scope of programs and degrees offered;

2. Geographic area served by the institution; and

3. The projected size of the student body and staff, for each year of the life of the plan.

B. *Specify steps to be taken to strengthen the role of traditionally black institutions in the state system.*

In support of the specific steps required by I.B., the plan shall include:

1. Commitments that necessary improvements will be made to permit the traditionally black institutions to fulfill their defined mission. These improvements will extend to physical plant and equipment; quality and range of

program offerings; number and quality of faculty; student, faculty and professional staff services; student financial assistance, and other financial support;

2. Commitments that traditionally black institutions will have the resources (including those enumerated in item 1 above), which are at least comparable to those at traditionally white institutions having similar missions.

3. An assessment of the physical plant at traditionally black institutions; and

4. A detailed discription of the resources, expressed in dollars and in numbers of personnel to be assigned, which the state system will provide (and the source for such funds) in order to implement the steps specified in I.B. reported by year for the life of the step or activity.

C. *Commit the state to take specific steps to eliminate educationally unnecessary program duplication among traditionally black and traditionally white institutions in the same service area.*

To this end, the plan shall identify existing degree programs (other than core curricula) among institutions having identical or overlapping service areas and indicate specifically with respect to each area what steps the state will take to eliminate such duplication. The elimination of such program duplication shall be carried out consistent with the objective of strengthening the traditionally black colleges.

D. *Commit the state to give priority consideration to placing any new undergraduate, graduate, or professional degree programs, courses of study etc., which may be proposed, at traditionally black institutions, consistent with their missions.*

E. *Commit the state to withhold approval of any changes in the operation of the state system or of any institutions that may have the effect of thwarting the achievement of its desegregation goals.*

F. *Commit the State to advise OCR of proposed major changes in the mission or the character of any institution within the state system which may directly or indirectly affect the achievement of its desegregation goals prior to their formal adoption.*

Such proposed changes include but are not limited to: the establishment or major expansion of programs of study, of departments, or institutions; the alteration of two year to four year institutions; the conversion of a private to a public institution; or the closing or merger of institutions or campuses.

G. *Specify timetables for sequential implementation of the actions necessary to achieve these goals as soon as possible but no later than within five years (by the close of the fifth full academic year after the plan is accepted) unless compelling justification for a longer period for compliance is provided to and accepted by the Department.*

The plan shall include interim benchmarks and goals from which progress toward these objectives may be measured. These timetables and benchmarks shall be appropriate to the nature of the action to be taken. For example, studies of physical plant and resources comparability should be completed promptly; corrective actions (including capital construction) will require longer time periods.

H. *Commit the state and all its involved agencies and subdivisions to specific measures for achievement of the above objectives.*

Such measures may include but are not limited to establishing cooperative programs consistent with institutional missions; reassigning specified programs, course offerings, resources and/or services among institutions; realigning the land grant academic programs so that research, experiment and other educational services are redistributed on a nonracial basis; and merging institutions

or branches thereof, particularly where institutions or campuses have the same or overlapping services areas. The measures taken pursuant to this section should be consistent with the objective of strengthening the traditionally black colleges. A detailed description of these measures need not be submitted at the time the plan is filed, but should be filed as a supplementary statement within 30 days thereafter for review and comment by OCR. Measures that offer no reasonable possibility of achieving the goals listed above will be rejected by OCR. Revised measures will be required before the plan can be accepted.

II. DESEGREGATION OF STUDENT ENROLLMENT

An acceptable plan shall commit the state to the goal of assuring that the system as a whole and each institution within the system provide an equal educational opportunity, are open and accessible to all students, and operate without regard to race and on a desegregated basis.

To achieve the desegregation of student enrollment, each plan shall:

A. *Adopt the goal that for two year and four year undergraduate public higher education institutions in the state system, taken as a whole, the proportion of black high school graduates throughout the state who enter such institutions shall be at least equal to the proportion of white high school graduates throughout the state who enter such institutions.*

B. (1) *Adopt the goal that there shall be an annual increase, to be specified by each state system, in the proportion of black students in the traditionally white four year undergraduate public higher education institutions in the state system taken as a whole and in each such institution; and*

(2) *Adopt the objective of reducing the disparity between the proportion of black high school graduates and*

the proportion of white high school graduates entering[8] *traditionally white four year and upper division undergraduate public higher education institutions in the state system; and adopt the goal of reducing the disparity by at least fifty per cent by the final academic year of the plan. However, this shall not require any state to increase by that date black student admissions by more than 150% above the admissions for the academic year preceding the year in which the plan is requested by HEW.*[9]

C. *Adopt the goal that the proportion of black state residents who graduate from undergraduate institutions in the state system and enter graduate study or professional schools in the state system shall be at least equal to the proportion of white state residents who graduate from undergraduate institutions in the state system, and enter such schools.*

This goal (and interim benchmarks or goals) shall be seperately stated for each major field of graduate and professional study. To assure that this goal can be met in the immediate future special recruitment efforts should be considered at traditionally black institutions. Particular attention should be given to increasing black student enrollment and graduation from those traditionally white four year undergraduate institutions which serve as the feeder institutions for the graduate and professional

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[8] For the purposes of this subsection, the term entering includes first-time transfers from two year and other institutions.

[9] Thus, where the present entry by black students in four year trationally white institutions is at a rate of 1,000 students per year and a fully proportional rate would be 3,000 students per year, the state's goal would be an entry rate of 2,000 students per year five years thereafter. A state where the present entry is at a rate of only 500 students per year and full proportionality would be 3,000 students per year would not by that date have to close half the gap (by a rate of 1,750 per year) but only achieve an entry rate of 1,250 students, which is 150% over its present rate of 500.

schools. Achievement of this goal is of particular importance in light of the specific concern expressed by the Court of Appeals in Adams. In assessing progress toward this goal, OCR will give consideration to the number of blacks from each state who enroll in graduate and professional schools outside the state system.

D. *Adopt the goal of increasing the total proportion of white students attending traditionally black institutions.*

Increased participation by white students at traditionally black institutions must be a part of the process of desegregation of the statewide system of higher education. However, pursuant to the admonition of the courts in *Adams*, "The desegregation process should take into account the unequal status of the Black colleges and the real danger that desegregation will diminish higher education opportunities for Blacks." Civil Action No. 3095-70, Second Supplemental Order at p. 4. The following steps are designed to guard against the diminution of higher educational opportunities for black students, to take into account the unique importance of traditionally black colleges and to comply with the mandate of Title VI. Establishment of numerical goals for the enrollment of white students at traditionally black institutions must be preceded by an increasing enrollment of black students in the higher education system and at the traditionally white institutions, as is required by Section II of these criteria. It must also be preceded by the accomplishment of specific steps to strengthen the role of traditionally black institutions, eliminate program duplication, locate new programs at black institutions, and by such other measures as are set forth in Section I.

OCR shall annually review the progress made by each state in increasing participation by black students in higher education and in the disestablishment of the dual school system. Two years after the commencement of the plan, and consistent with such progress, each state system

shall specify annual numerical goals for increasing the participation of white students attending the traditionally black institutions.

E. *Commit the state to take all reasonable steps to reduce any disparity between the proportion of black and white students completing and graduating from the two years, four year and graduate public institutions of higher education, and establish interim goals, to be specified by the state system for achieving annual progress.*

F. *Commit the state to expand mobility between two year and four year institutions as a means of meeting the goals set forth in these criteria.*

G. *Specify numeric goals for II. A, B, and C, and timetables for sequential implementation of actions necessary to achieve these goals as soon as possible but not later than within five years unless another date is specified in this section.*

H. *Commit the state and all its involved agencies and subdivisions to specific measures to achieve these goals.*

Such measures may include, but are not limited to reviewing, monitoring, and revising, as necessary, procedures for student recruitment, admissions, compensatory instruction, counseling, financial aid, and staff and faculty development programs. The detailed description of these measures need not be submitted at the time the plan is filed, but should be filed as a supplementary statement within 30 days thereafter for review and comment by OCR. Measures that offer no reasonable possibility of achieving the numerical goals will be rejected by OCR. Revised measures will be required before the plan can be accepted.

III. DESEGREGATION OF FACULTY, ADMINISTRATIVE STAFFS, NONACADEMIC PERSONNEL, AND GOVERNING BOARDS

An acceptable plan shall commit the state system to the goal of increasing the number and proportion of black employees, academic and non-academic, throughout the system and of increasing representation of black citizens among appointive positions on the governing boards of the state system and of individual institutions.

To achieve the desegregation of faculty, administrators, other personnel, and governing boards, each plan shall:

A. *Adopt the goal that the proportion of black faculty and of administrators at each institution and on the staffs of each governing board, or any other state higher education entity, in positions not requiring the doctoral degree, shall at least equal the proportion of black students graduating with masters degrees in the appropriate discipline from institutions within the state system, or the proportion of black individuals with the required credentials for such positions in the relevant labor market areas, whichever is greater.*

B. *Adopt the goal that the proportion of black faculty and of administrators at each institution and on the staffs of each governing board or any other state higher education entity, in positions requiring the doctoral degree, shall at least equal the proportion of black individuals with the credentials required for such positions in the relevant labor market area.*

C. *Adopt the goal that the proportion of black non-academic personnel (by job category) at each institution and on the staffs of each governing board or any other state higher education entity, shall be at least equal the proportion of black persons in the relevant labor market area.*

D. *Assure hereafter and until the foregoing goals are met that for the traditionally white institutions as a*

whole, the proportion of blacks hired to fill faculty and administrative vacancies shall not be less than the proportion of black individuals with the credentials required for such positions in the relevant labor market area.

E. *Specify numeric goals and timetables for sequential implementation of the actions necessary to achieve these objectives including interim benchmarks from which progress toward the objectives may be measured.*

These goals, timetables, and benchmarks shall be established in light of, and shall specify, the current and projected rates of vacancies in the various job categories, present and projected labor market availability, and other relevant factors.

F. *Commit the state system to take specific measures to achieve these objectives.*

Such measures may include, but are not limited to employment programs providing centralized recruitment, vacancy and applicant listings; transfer options; faculty development programs permitting release time for black faculty to attain the terminal degree; and the interchange of faculty on a temporary or permanent basis among traditionally white and traditionally black institutions within the state system. The detailed description of these measures need not be submitted at the time the plan is filed, but should be filed as a supplementary statement within 30 days thereafter for review and comment by OCR. Measures that offer no reasonable possibility of achieving the goals listed above will be rejected by the OCR. Revised measures will be required before the plan can be accepted.

G. *Adopt the goal of increasing the numbers of black persons appointed to systemwide and institutional governing boards and agencies so that these boards may be more representative of the racial population of the state or of the area served.*

IV. SUBMISSION OF PLANS AND MONITORING

A. After HEW has determined that a state has not eliminated the vestiges of desegregation in its former dual system of public higher education, the state shall submit to OCR a desegregation plan for its system of public higher education to implement the foregoing criteria.

1. The plan shall commit the state to substantial progress toward each of the goals in the first two years of the plan.

2. The plan shall be signed by the governor and by each official or designated person representing the agencies, associations, commissions, offices, and/or institutions responsible for adopting the systemwide and institutional goals described therein. Such persons or entities must be authorized under state law to perform all actions necessary to achieve these goals.

3. The plan shall certify that achievement of the goals and interim benchmarks specified therein has been adopted as official policy of each official or agency.

B. It is recommended that each state establish a biracial citizens advisory/monitoring committee to assist the state in monitoring the implementation of the plan.

C. Each state shall submit to OCR by August 15 of each year after a plan's acceptance, a comprehensive narrative assessment of its desegregation efforts in the most recent academic year. This narrative assessment shall include:

1. A description of the specific measures which have been taken to achieve the objectives enumerated in the plan and in the criteria;

2. A description of the results achieved, including quantitative indices where appropriate or required;

3. An analysis of the reasons why any steps taken proved inadequate or insufficient; and

4. A description of the steps the state will take to achieve progress and to maintain the timetable set forth in the plan.

D. OCR shall review such narrative reports. If good cause for the failure to meet interim goals is not demonstrated, OCR may impose more stringent requirements, including advance approval by OCR of desegregation methods, in order to assure achievement of the goals of the plan. In the alternative, the Department may initiate enforcement proceedings under Title VI of the Civil Rights Act of 1964, if compliance with Title VI cannot be achieved by voluntary means.

E. Each plan shall provide that the state will furnish to OCR statistical reports, assessments, and such other information as OCR may deem necessary from time to time in order to determine the effectiveness of the state's efforts to achieve the goals described in these criteria. Such information shall include annual statistical reports in substantially the same format used previously by the affected states pursuant to earlier desegregation plans. Specific dates for the submission of the reports will be established by OCR. In the event that subsequent developments call for the submission of additional data, such requirements will be announced after consultation with the states, and the states and institutions shall have sufficient time to develop the system needed for the gathering of additional data.

V. DEFINITIONS

As used in these criteria:

A. "Department" refers to the U.S. Department of Health, Education, and Welfare. In instances where the "Department" is to take certain actions, they may be

performed by the Office for Civil Rights or the Director, Office for Civil Rights, on behalf of the Department.

B. "Institution" means any school, college, junior or community college, university, professional or graduate school, administered by or as an agency of the state government. Four year institution means any school, college, or university that offers a baccalaureate or graduate degree. For the purpose of these criteria, "institution" does not refer to private schools or colleges.

C. "State systems" means the aggregate of all state public institutions of higher education within the state, whether or not under the governance of the same state agency or board.

D. "Student" means any person enrolled in an instructional program, whether full-time or part-time, subject to exceptions to be specified by the Office For Civil Rights.

E. "Faculty" means all persons employed by an institution as full-time instructional personnel.

F. "Labor market area" means the geographical area in which an institution or campus traditionally recruits or draws applicants possessing the requisite credentials for vacancies in faculty, administrative, or non-academic personnel positions.

G. "Governing board" means that appointed or elected body, whether or not responsible to the governor of a state or to the state legislature, which is charged under state law with the ultimate responsibility for the administration and operation of institutions within the state system of public higher education. A "governing board" may be responsible for the entire system, for a single campus or institution thereof, or for a specified group of campuses or institutions.

Dated: February 2, 1978.

DAVID S. TATEL,
Director, Office for Civil Rights.

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PART 80—NONDISCRIMINATION UNDER PROGRAMS RECEIVING FEDERAL ASSISTANCE THROUGH THE DEPARTMENT OF HEALTH AND HUMAN SERVICES EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

§ 80.1 Purpose.

The purpose of this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964 (hereafter referred to as the "Act") to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assitance from the Department of Health and Human Services.

§ 80.2 Application of this regulation.

This regulation applies to any program for which Federal financial assistance is authorized to be extended to a recipient under a law administered by the Department, including the Federal assisted programs and activities listed in Appendix A of this regulation. It applies to money paid, property transferred, or other Federal financial assistance extended after the effective date of the regulation pursuant to an application approved prior to such effective date. This regulation does not apply to (a) any Federal financial assistance by way of insurance or guaranty contracts, (b) money paid, property transferred, or other assistance extended before the effective date of this regulation, (c) the use of any assistance by any individual who is the ultimate beneficiary under any such program, or (d) any employment practice, under any such program, or any employer, employment agency, or labor organization, except to the extent described in § 80.3. The fact that a type of Federal assistance is not listed in Appendix A shall not mean, if Title VI of the Act is otherwise applicable that a program is not covered. Federal financial assistance under statutes now in

force or hereinafter enacted may be added to this list by notice published in the FEDERAL REGISTER.

§ 80.3 Discrimination prohibited.

(a) *General.* No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.

(b) *Specific discriminatory actions prohibited.* (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on ground of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or their benefit provided under the program;

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which

is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program of the objectives of the program as respect individuals of a particular race, color, or national origin.

(3) In determining the site or location of a facilities, an applicant or recipient may not make selections with the effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any programs to which this regulation applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

(4) As used in this section, the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6) (i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(c) *Employment practices.* (1) Where a primary objective of the Federal financial assistance to a program to which this regulation applies is to provide employment, a recipient may not (directly or through contractual or other arrangements) subject an individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities), including programs where a primary objective of the Federal financial assistance is (i) to reduce the employment of such individuals or to help them through employment to meet subsistence needs, (ii) to assist such individuals through employment to meet expenses incident to the commencement or continuation of their education or training, (iii) to provide work experience which contributes to the education or training of such individuals, or (iv) to provide remunerative activity to such individuals who because of handicaps cannot be readily absorbed in the competitive labor market. The following, under existing laws, have one of the above objectives as a primary objective:

(*a*) Projects under the Public Works Acceleration Act, Pub. L. 87-658, 42 U.S.C. 2641-2643.

(*b*) Work-study under the Vocational Education Act of 1963, as amended, 20 U.S.C. 1371-1374.

(*c*) Programs assisted under laws listed in Appendix A as respects employment opportunities provided thereunder, or in facilities provided thereunder, which are limited, or for which preference is given, to students, fellows, or other persons in training for the same or related employments.

(*d*) Assistance to rehabilitation facilities under the Vocational Rehabilitaton Act, 29 U.S.C. 32-34, 41a and 41b.

(2) The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

(d) *Indian Health and Cuban Refugee Services.* An individual shall not be deemed subjected to discrimination by reason of his exclusion from the benefits of a program limited by Federal law to individuals of a particular race, color, or national origin different from his.

(e) *Medical emergencies.* Notwithstanding the foregoing provisions of this section, a recipient of Federal

financial assistance shall not be deemed to have failed to comply with paragraph (a) of this section if immediate provision of a service or other benefit to an individual is necessary to prevent his death and such service or other benefit cannot be provided except by or through a medical institution which refuses or fails to comply with paragraph (a) of this section.

§ 80.4 Assurances required.

(a) *General.* (1) Every application for Federal financial assistance to carry out a program to which this part applies, except a program to which paragraph (b) of this section applies, and every application for Federal financial assistance to provide a facility shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. In the case of an application for Federal financial assistance to provide real property or structures thereon, the assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. In the case of personal property the assurance shall obligate the recipient for the period during which he retains ownership or possession of the property. In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended pursuant to the application. The responsible Department official shall specify the form of the foregoing assurances for each program, and the extent to which like assurances will be required of subgrantees, contractors and subcontractors, transferees, successors in interest, and other participants in the program. Any such

assurance shall include provisions which give the United States a right to seek its judicial enforcement.

(2) Where Federal financial assistance is provided in the form of a transfer of real property or interest therein from the Federal Government the instrument effecting or recording the transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision or similar services or benefits. Where no transfer of property is involved but property is improved with Federal financial assistance, the recipient shall agree to include such a covenant to any subsequent transfer of the property. Where the property is obtained from the Federal Government, such covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant where, in the discretion of the responsible Department official, such a condition and right of reverter is appropriate to the statute under which the real property is obtained and to the nature of the grant and the grantee. In the event a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on such property for the purposes for which the property was transferred, the responsible Department official may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate, to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

(b) *Continuing State programs.* Every application by a State or a State agency to carry out a program involving continuing Federal financial assistance to which this regulation applies (including the Federal financial assist-

ance listed in Part 2 of Appendix A) shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application (1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this regulation, and (2) provide or be accompanied by provision for such methods or administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this regulation.

(c) *Elementary and secondary schools.* The requirements of paragraph (a) or (b) of this section with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any future modification of such order, or (2) submits a plan for the desegregation of such school or school system which the responsible Department official determines is adequate to accomplish the purposes of the Act and this part, at the earliest practicable time, and provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the responsible Department official may reserve the right to redetermine, after such period as may be specified by him, the adequacy of the plan to accomplish the purposes of the Act and the regulations in this part. In any case in which a final order of a court of the United States for the desegregation of such school or school ssytem is entered after submi ion of such a plan, such plan shall be revised to conform to such final order, including any future modification of such order.

(d) *Assurance for institutions.* (1) In the case of any application for Federal financial assistance to an institu-

tion of higher education (including assistance for construction, for research, for special training project, for student loans or for any other purpose), the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an institution of higher education, hospital, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, patients, or clients of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department officials, that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the program of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such program. If in any such case the assistance sought is for the construction of a facility or part of a facility, the assurance shall in any event extend to the entire facility and to facilities operated in connection therewith.

§ 80.5 Illustrative application.

The following examples will illustrate the programs aided by Federal financial assistance of the Department. (In all cases the discrimination prohibited is discrimination on the ground of race, color, or national origin prohibited by Title VI of the Act and this regulation, as a condition of the receipt of Federal financial assistance).

(a) In federally assisted programs for the provision of health or welfare services, discrimination in the selection or eligibility of individuals to receive the services, and segregation or other discriminatory practices in the manner of providing them, are prohibited. This prohibition

extends to all facilities and services provided by the grantee under the program or, if the grantee is a State, by a political subdivision of the State. It extends also to services purchased or otherwise obtained by the grantee (or political subdivision) from hospitals, nursing homes, schools, and similar institutions for beneficiaries of the program, and to the facilities in which such services are provided, subject, however, to the provisions of § 80.3(e).

(b) In federally-affected area assistance (Pub. L. 815 and Pub. L. 874) for construction aid and for general support of the operation of elementary or secondary schools, or in more limited support to such schools such as for the acquisition of equipment, the provision of vocational education, or the provision of guidance and counseling services, discrimination by the recipient school district in any of its elementary or secondary schools in the admission of students, or in the treatment of its students in any aspect of the educational process, is prohibited. In this and the following illustrations the prohibition of discrimination in the treatment of students or other trainees includes the prohibition of discrimination among the students or trainees in the availability or use of any academic, dormitory, eating, recreational, or other facilities of the grantee or other recipient.

(c) In a research, training, demonstration, or other grant to a university for activities to be conducted in a graduate school, discrimination in the admission and treatment of students in the graduate school is prohibited, and the prohibition extends to the entire university unless it satisfies the responsible Department official that practices with respect to other parts or programs of the university will not interfere, directly or indirectly, with fulfillment of the assurance required with respect to the graduate school.

(d) In a training grant to a hospital or other nonacademic institution, discrimination is prohibited in the selection of individuals to be trained and in their treat-

ment by the grantee during their training. In a research or demonstration grant to such an institution discrimination is prohibited with respect to any educational activity and any provision of medical or other services and any financial aid to individuals incident to the program.

(e) In grants to assist in the construction of facilities for the provision of health, educational or welfare services, assurances will be required that services will be provided without discrimination, to the same extent that discrimination would be prohibited as a condition of Federal operating grants for the support of such services. Thus, as a condition of grants for the construction of academic, research, or other facilities at institutions of higher education, assurances will be required that there will be no discrimination in the admission or treatment of students. In case of hospital construction grants the assurance will apply to patients, to interns, residents, student nurses, and other trainees, and to the privilege of physicians, dentists, and other professional qualified persons to practice in the hospital, and will apply to the entire facility for which, or for a part of which, the grant is made, and to facilities operated in connection therewith. In other construction grants the assurances required will similarly be adapted to the nature of the activities to be conducted in the facilities for construction of which the grants have been authorized by Congress.

(f) Upon transfers of real or personal surplus property for health or educational uses, discrimination is prohibited to the same extent as in the case of grants for the construction of facilities or the provision of equipment for like purposes.

(g) Each applicant for a grant for the construction of educational television facilities is required to provide an assurance that it will, in its broadcast services, give due consideration to the interests of all significant racial or ethnic groups within the population to be served by the applicant.

(h) A recipient may not take action that is calculated to bring about indirectly what this regulation forbids it to accomplish directly. Thus, a State, in selecting or approving projects or sites for the construction of public libraries which will receive Federal financial assistance, may not base its selections or approvals on criteria which have the effect of defeating or of substantially impairing accomplishments of the objectives of the Federal assistance race, color or national origin.

(i) In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under § 80.6(d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation, have failed to overcome these consequences, it will become necessary under the requirement stated in (i) of § 80.3(b)(6) for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example, of specific arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served.

(j) Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not in fact be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may eseablish special recruitment pol-

icies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service.

§ 80.6 Compliance information.

(a) *Cooperation and assistance.* The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency,

institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

§ 80.7 Conduct of investigations.

(a) *Periodic compliance reviews.* The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) *Investigations.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible non-compliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.3.

(3) If an investigation does not warrant action pursuant to paragraph (d) (1) of this section the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential, except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

§ 80.8 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 80.4.* If an applicant fails or refuses to furnish an assurance required under § 80.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an applicant therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No other suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department officials has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to

comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other persons. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

§ 80.9 Hearings

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 80.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant

or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 80.8(c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Department in Washington, D.C., at a time fixed by the responsible Department official unless he determines that the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before a hearing examiner designated in accordance with 5 U.S.C. 3105 and 3344 (section 11 of the Administrative Procedure Act).

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with sections 5-8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evi-

dence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing. Any person (other than a Government employee considered to be an official business) who, having been invited or requested to appear and testify as a witness on the Government's behalf, attends at a time and place scheduled for a hearing provided for by this part, may be reimbursed for his travel and actual expenses of attendance in an amount not to exceed the amount payable under the standardized travel regulations to a Government employee traveling on official business.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offerde or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or Joint Hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this regulation with respect to two or more programs to which this part applies, or noncompliance wiht this part and the regulation of one or more other Federal departments or agencies issued under Title VI of the Act, the responsible Department official may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings

of rules of procedures not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 80.10.

§ 80.10 Decisions and notices.

(a) *Decisions by hearing examiners.* After a hearing is held by a hearing examiner such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the reviewing authority for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and to the complainant, if any. Where the initial decision referred to in this paragraph or in paragraph (c) of this section is made by the hearing examiner, the applicant or recipient or the counsel for the Department may, within the period provided for in the rules of procedure issued by the responsible Department official, file with the reviewing authority exceptions to the iniital decision, with his reasons therefor. Upon the filing of such exceptions the reviewing authority shall review the initial decision and issue its own decision thereof including the reasons therefor. In the absence of exceptions the initial decision shall constitute the final decision, subject to the provisions of paragraph (e) of this section.

(b) *Decisions on record or review by the reviewing authority.* Whenever a record is certified to the reviewing authority for decision or it reviews the decision of a hearing examiner pursuant to paragraph (a) or (c) of this section, the applicant or recipient shall be given reasonable opportunity to file with it briefs or other written statements of its contentions, and a copy of the final decision of the reviewing authority shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 80.9(a) the

reviewing authority shall make its final decision on the record or refer the matter to a hearing examiner for an initial decision to be made on the record. A copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of a hearing examiner or reviewing authority shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Review in certain cases by the Secretary.* If the Secretary has not personally made the final decision referred to in paragraph (a), (b), or (c) of this section, a recipient or applicant or the counsel for the Department may request the Secretary to review a decision of the Reviewing Authority in accordance with rules of procedure issued by the responsible Department official. Such review is not a matter of right and shall be granted only where the Secretary determines there are special and important reasons therefor. The Secretary may grant or deny such request, in whole or in part. He may also review such a decision upon his own motion in accordance with rules of procedure issued by the responsible Department official. In the absence of a review under this paragraph, a final decision referred to in paragraphs (a), (b), and (c) of this section shall become the final decision of the Department when the Secretary transmits it as such to Congressional committees with the report required under section 602 of the Act. Failure of an applicant or recipient to file an exception with the Reviewing Authority or to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part,

to which this regulation applies, and many contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this regulation, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended under such law or laws to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this regulation, or to have otherwise failed to comply with this regulation unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this regulation.

(g) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part. An elementary or secondary school or school system which is unable to file an assurance of compliance with § 80.3 shall be restored to full eligibility to receive Federal financial assistance, if it files a court order or a plan for desegregation which meets the requirements of § 80.4(c), and provides reasonable assurance that it will comply with the court order or plan.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the responsible Department official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (g)(1) of this section. If the responsible Department official determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the responsible Department official denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the responsible Department official. The applicant or recipient will be stored to such eligibility if it proves at such hearing that it satisfied the requirements of paragraph (g) (1) of this section. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

§ 80.12 Effect on other regulations, forms and instructions.

(a) *Effect on other regulations.* All regulations, orders, or like directions heretofore issued by any officer of the Department which impose requirements designed to prohibit any discrimination against individuals on the ground of race, color, or national origin under any program to which this regulation applies, and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for or recipient of assistance for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this regulation, except that nothing in this regulation shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this regulation. Nothing in this regulation, however, shall be deemed to supersede any of the following (including future amendments thereof): (1) The "Standards for a Merit System of Personnel Administration," issued jointly by the Secretaries of Defense, of Health and Human Services, and of Labor, 45 CFR Part 70; (2) Executive Order 11063 and regulations issued thereunder, or any other regulations or instructions, insofar as such Order,

regulations, or instructions prohibit discrimination on the ground of race, color, or national origin in any program or situation to which this regulation is inapplicable, or prohibit discrimination on any other ground; or (3) requirements for Emergency School Assistance as published in 35 FR 13442 and codified as 45 CFR Part 181.

(b) *Forms and instructions.* The responsible Department official shall issue and promptly make available to interested persons forms and detailed instructions and procedures for effectuating this part.

(c) *Supervision and coordination.* The responsible Department official may from time to time assign to officials of the Department, or to officials of other departments or agencies of the Government with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of Title VI of the Act and this regulation (other than responsibility for review as provided in § 80.10(e)), including the achievements of effective coordination and maximum uniformity within the Department and within the Executive Branch of the Government in the application of Title VI and this regulation to similar programs and in similar situations. Any action taken, determination made, or requirement imposed by an official of another Department or Agency acting pursuant to an assignment of responsibility under this subsection shall have the same effect as though such action had been taken by the responsible official of this Department.

§ 80.13 Definitions.

As used in this part—

(a) The term "Department" means the Department of Health and Human Services, and includes each of its operating agencies and other organizational units.

(b) The term "Secretary" means the Secretary of Health and Human Services.

(c) The term "responsible Department official" means the Secretary or, to the extent of any delegation by the Secretary of authority to act in his stead under any one or more provisions of this part, any person or persons to whom the Secretary has heretofore delegated, or to whom the Secretary may hereafter delegate such authority.

(d) The term "reviewing authority" means the Secretary, or any person or persons (including a board or other body specially created for that purpose and also including the responsible Department official) acting pursuant to authority delegated by the Secretary to carry out responsibilities under § 80.10(a) through (d).

(e) The term "United States" means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term "States" means any one of the foregoing.

(f) The term "Federal financial assistance" includes (1) grants and loans of Federal funds, (2) the grant or donation of federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(g) The term "program" includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals (including education or training, health, welfare, rehabilitation, housing, or other services, whether provided through employees of the re-

cipient of Federal financial assistance or provided by others through contracts or other arrangements with the recipient, and including work opportunities and cash or loan or other assistance to individuals) or for the provision of facilities for furnishing services, financial aid or other benefits to individuals. The services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any services, financial aid, or other benefits provided with the aid of Federal financial assistance or with the aid of any non-Federal funds, property, or other resources required to be expended or made available for the program to meet matching requirements or other conditions which must be met in order to receive the Federal financial assistance, and to include any services, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance or such non-Federal resources.

(h) The term "facility" includes all or any portion of structures, equipment, or other real or personal property or interests therein, and the provision of facilities include the construction, expansion, renovation, remodeling, alteration or acquisition of facilities.

(i) The term "recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program.

(j) The term "primary recipient" means any recipient which is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.

(k) The term "applicant" means one who submits an application, request, or plan required to be approved by a Department official, or by a primary recipient, as a condition to eligibility for Federal financial assistance, and the term "application" means such an application, request, or plan.

Art. 14, § 39

TRANSITIONAL PROVISIONS

PART IV

Section 38 of this Part provided an official ballot form for ratification of the proposed Constitution of 1974, and approval of alternative propositions. Section 39 and 40 provided text for Article VIII, Education, and Article XIV, Sections 1, 2, 3, 4 and 5 in the event Alternative B was approved.

The proposed Constitution was ratified by the people at an election held on April 20, 1974, and Alternative A was approved.

The provisions of section 38, 39 and 40 are included in note type below for convenient reference.

§ 38. Alternative Proposition

Section 38. There shall be submitted to the people for the ratification of the proposed new constitution an official ballot containing the following propositions and instructions to voters:

OFFICIAL BALLOT

(Instructions to voters: Place an "X" in the boxes which express your preferences. The full text of the proposed constitution and the alternative propositions are available for inspection at the polling place. If the proposed constitution receives a majority of the votes cast thereon and Alternative A below receives a majority of the votes cast on the alternative propositions, the proposed constitution shall become the Constitution of Louisiana. If the proposed constitution receives a majority of the votes cast

thereon and Alternative B receives a majority of the votes cast on the alternative propositions, the proposed constitution shall become the Constitution of Louisiana, except that Article VIII of the proposed Constitution shall be deleted therefrom and Alternative Article VIII shall be inserted in lieu thereof. If the proposed constitution fails to receive a majority of the votes cast thereon, both of the alternative propositions shall also fail.)

Do you favor or oppose the adoption of the proposed 1974 Constitution?

(Vote for one)

FOR adoption of the proposed 1974 Constitution...1 ☐

or

AGAINST adoption of the proposed 1974 Constitution .....2 ☐

ALTERNATIVE PROPOSITIONS

If the proposed 1974 Constitution is adopted, do you prefer (A) the governance of higher education by a Board of Regents and management boards for the LSU system, the Southern University system, and all other state colleges and universities, or (B) the governance of higher education solely by a Board of Regents?

(Vote for one)

ALTERNATIVE A For governance of higher education by a Board of Regents and management boards for the LSU system, the Southern University system, and all other state colleges and universities .....3 ☐

ALTERNATIVE B For governance of higher education solely by a Board of Regents .....4 ☐

A STATUS REPORT: BLACK STUDENT ENROLLMENT AND GRADUATION TRENDS IN THE COMMUNITY COLLEGE SYSTEM OF FLORIDA 1976-77 TO 1984-85

EXECUTIVE SUMMARY

This report was authorized by the Florida Advisory Committee on the Education of Blacks. The committee was concerned about the future role and development of Florida's educational system and its relationship to the number of Blacks enrolled and graduating from higher education in Florida.

While presenting an overview of trends which affect black student enrollment in public postsecondary educational institutions, the primary purpose of the report is to present a comprehensive chronology of black student enrollment in public postsecondary educational institutions in Florida. The aim of the literature review is to show black student enrollment from 1976-77 to 1984-85 in the Community College System. This examination focuses not only on black student enrollment as a percentage of total enrollment, but also presents data on each of the public twenty-eight community colleges in terms of the number and types of degrees earned by Blacks.

Research Questions

This study was guided by these four research questions:

1. What have been the enrollment trends for black students at institutions in the Community College System System;
2. What have been the degree-granting trends for black students at institutions in the Community College System;

3. What have been the enrollment trends for black community college transfer students at institutions in the State University Ssytem in Florida?; and
4. What have been the degree-granting trends for black community college transfer students in the State University System in Florida?

Sources of Data

The enrollment and graduation data presented in the study were obtained from the Florida Board of Regents, State Board of Community Colleges, Postsecondary Education Planning Commission, Southern Region Board and published and unpublished documents. The data are organized in tables, charts and graphs. The tables depict the enrollment and graduation data for the community colleges total populations and black students. There are also tables that show enrollment, attrition and graduation data for community colleges total population and black students in the public universities. Those colleges appear in alphabetical order by name.

Graphs and charts are presented only for the purpose of providing an alternative means of displaying the data.

Major Findings of the Study

The major findings of this study are as follows:

- Black student enrollment declined from the 1978 fall term through the 1985 fall term in 21 of the 28 community colleges.
- Black students were graduated from community colleges at a rate lower than their counterparts.
- The number of students transferring from community colleges into public universities declined from 1976 through 1985.
- Public universities retained other transfer students in greater numbers than they retained black students.

- Black students graduation rates were always one-half or less of the number of black transferees from the community colleges.
- The largest decline in the number of community college graduates occurred between academic years 1983-84 and 1984-85.
- Hispanic students surpassed black students as the largest minority group of community college transfers in public universities from academic years 1980-81 through 1984-85.
- The group with the lowest graduation rate from public universities six years after transferring from community colleges was black students.

RECOMMENDATIONS

The analysis of data and review of the related literature suggest these recommendations:

1. Community colleges should examine their overall recruitment procedures.
2. Community colleges should determine the effectiveness of their recruitment procedures for attracting black students.
3. Community colleges should identify the causative factors in the high rate of attrition among black students.
4. Community colleges should critically examine their methods of preparing black students to master graduation requirements.
5. Community colleges should examine the reasons for the decline in the number of black students with associate in arts degrees transferring into the State University System.

6 Public universities should examine their procedures for recruiting black students with associate in arts degrees.

7. Public universities should examine the causes of the high attrition among black transferees.

8. Public universities should examine their methods of preparing black community college transferees for graduation.

ACKNOWLEDGEMENTS

This report was made possible by the efforts of many people. The author wishes to express his gratitude to them. Although space does not permit mention of all those involved, several must be singled out.

Without the assistance of two key individuals, data on the universisies and community colleges could not have been obtained. Appreciation is given to Mr. Lillie Shelton, EAEO officer of the State University System of Florida, and Dr. Dianne Brown, EAEO officer for the Division of Community Colleges in Florida. It was through their collective input that the need for this kind of study was made apparent.

Thanks are also extended to members of the Advisory Committee on the Education of Blacks in Florida, Ms. Dorothy Williams, staff member to the committee; and consultants who worked with the data during its various stages of completion.

Dr. Richard Campbell of Minority Research, Inc., directed computer processing.

To all the above, I am grateful.

Leonard Bryant, Jr.

INTRODUCTION

This report stems from the Advisory Committee's concern for the future role and development of Florida's educational system and its relationship to the number of Blacks enrolled in and graduating from higher education in Florida.

While substantial progress has been made in equaling educational opportunities for Blacks in Florida, the plight of Blacks in the community colleges and universities remains severe.

This study tries to answer four basic questions over the critical nine-year period from 1976 to 1986:

1. What have been the enrollment trends for black students at institutions in the Community College System in Florida?

2. What have been the degree-granting trends for black students at institutions in the Community College System in Florida?

3. What have been the enrollment trends for black community college transfer students at institutions in the State University System in Florida?

4. What have been the degree-granting trends for black community college transfer students in the State University System in Florida?

This study examines two very important indices of growth and development 1) trends in black student enrollment; and 2) trends in awarding degrees to black students. These can indicate whether the institutions or systems are stagnant or growing and changing. This study examines the flow of trained black manpower in Florida—a flow that consistently has decreased while the spotlight of social progress has been focused on enrollment increases alone, rather than on graduation increases.

DEFINITION OF TERMS:

Unclassified college level student—a student taking college level courses and not seeking a degree, certification or award.

FTIC—First time in college student; a student not having attended college before.

Florida resident—a student residing in the state of Florida for twelve months or more with the intention of making the state of Florida a permanent home.

SUS—State University System of Florida.

REVIEW OF LITERATURE

INTRODUCTION

The enactment of the Higher Education Act of 1965 committed the country to providing equal opportunity in higher education for all its citizens, regardless of race or economic circumstances. Much has been written since 1956 about the assimilation of Blacks into predominantly white postsecondary educational institutions and the survival of predominantly black colleges and universities. The years since 1965 have also brought about radical changes in both black student enrollment and graduation patterns, as well as in the institutions at which black students matriculate (Allen, 1986).

Prior to 1965, the overwhelming majority of Blacks who attended postsecondary educational institutions were enrolled in predominantly black institutions, most of which were commonly referred to as traditionally black institutions or TBIs. These institutions were established to provide education to Blacks under the "separate but equal doctrine." Until the early seventies, these institutions enrolled more than 50 percent of the black college students in the following states: Virginia, North Carolina,

South Carolina, George, Kentucky, Tennessee, Alabama, Missouri, Arizona, Mississippi, Ohio, Delaware, Louisiana, Texas, Oklahoma and Florida (Hill, 1984). In 1980, the National Center for Education Statistics listed 166 predominantly black colleges.

The number of black students enrolled in traditionally black institutions increased during the early seventies, but the number of black students enrolled in other institutions increased as well. By 1980, two-thirds of all black students attending college were enrolled at predominantly white colleges where white students comprised more than 50 percent of the total student body.

Traditionally black institutions are different from current predominantly black institutions which were not historically black, but which currently have predominantly black student bodies. Historically black institutions, located mainly in the South, were established during Reconstruction and after the passage of the second Morrill Land Grant Act of 1890 (Fleming, 1984). In 1980, only 27 percent of all black college students were attending predominantly black institutions. According to Hill (1984), another seven percent of all black college students were attending colleges where no single ethnic group comprised 50 percent of the student body.

In 1949, approximately 90 percent of the Blacks who had college degrees received them from black institutions; and even as late as 1967, about 80 percent of the bachelor of arts degrees received by Blacks were earned at black institutions (Fleming, 1984). Fleming quotes the results of a 1976 study conducted by Jordan which states that black colleges have produced "75 percent of all black holders of Ph.D. degrees, 76 percent of all black army officers, 80 percent of all black federal judges, and 85 percent of all black doctors." Even today, when many black students are enrolling in predominantly white institutions, Fleming contends that a large number of Blacks

will continue to enroll at predominantly black institutions for personal reasons. These personal reasons include location and proximity to students' homes, cost and psychosocial factors.

In 1984, black students accounted for 9.5 percent of all undergraduates nationwide, 4.8 percent of all graduate students, and 4.8 percent of all students in professional programs (*Chronicle of Higher Education*, July 23, 1986). See Table 1.

TABLE 1

Racial/Ethnic Representation of 1984 Enrollment

	Undergraduate	Gradute	Professional	Unclassified
Am Indian	0.7	0.3	0.4	0.7
Asian	3.2	2.6	3.3	3.2
Black	9.5	4.8	4.8	8.0
Hispanic	4.6	2.2	2.9	4.5
White	79.9	80.2	87.4	82.0
Foreign	2.1	9.9	1.2	1.6
TOTAL	100%	100%	100%	100%

Source: *Chronicle of Higher Education* (July 23, 1986).

Declining Black Student Enrollment

From the mid-sixties to the mid-seventies, the number of black students enrolling in colleges and universities rose dramatically. The relative proportion of black students in total enrollment reached record highs. In the late 1970's, however, the rates of increase in the enrollment of black students unexpectedly began to decline, and black students as a proportion of total enrollment decreased.

According to Anderson (1984), by 1973, the percentage of black students attending predominantly black postsecondary colleges had declined to roughly one-quarter of the previous enrollment. Further, three-fourths of all black college students were attending predominantly white institutions (National Center for Education Statistics,

1982). The increased number of black students in attendance at predominantly white institutions resulted in approximately 57 percent of all black baccalaureate degree recipients in 1977-79 obtaining their degrees from predominantly white institutions (Deskins, 1981). Hill (1984), on the other hand, reports that in 1981:

- Traditionally black institutions still graduated over half of the black bachelor's degree recipients in the 20 states where these institutions are located.
- Traditionally black institutions graduated one-third of the black master's and first-professional degree recipients in these states (TBI states).

A year later, in 1982, Blacks in non-traditional black institutions constituted less than five percent of the degree recipients at all levels; and public institutions awarded a lower percentage of their degrees to Blacks than did private institutions, according to Hill. Mingle (1978) also reported on the increase in black student enrollment from the mid-sixties to the mid-seventies. During this period, according to Mingle, black student enrollment in southern postsecondary institutions increased by more than 290,000 and numbered approximately 462,000. Many of these students were attending predominantly white institutions, whereas in 1982, the number of black students enrolled in predominantly white institutions totaled 84 percent. Before the seventies, traditionally black institutions enrolled more than half of all black college students; but in 1980, these institutions only enrolled approximately 27 percent of all black college students (Darling-Hammond, quoted in *Chronicle of Higher Education*, April 17, 1985).

Marks (1984) states that the greatest decline in black student enrollment occurred at traditionally black institutions: nationally, the decline was 7.1 percent or 28,000. Community Colleges showed the greatest increase in black student enrollment nationally. See Table 2.

TABLE 2

Black Headcount Enrollment by Type of Institution, Fall 1982;
Percent Change of 1980-1982 and 1976-1982;
Percent of Enrollment Black, 1982
United States and SREB States

	Black Headcount Enrollment 1982	Percent Change 1980-82	Change 1976-82	Percent of Enrollment Black 1982
United States	1,034,880	-0.4	6.7	8.8
Public/Four-year	423,407	-3.9	-0.2	8.1
Two-year	409,459	3.3	10.5	10.0
Private/Four-year	181,980	-2.2	5.3	7.5
Two-year	19,834	6.5	85.6	13.6
Predominantly Black*	309,079	-8.2	-7.5	78.2
SREB States	425,580	0.2	8.6	14.0
Public/Four-year	208,845	-1.3	2.9	13.0
Public/Two-year	140,839	2.9	13.8	14.2
Private/Four-year	68,512	-2.0	2.0	15.0
Private/Four-year	7,384	5.4	132.3	27.3
Predominantly Black*	183,321	-4.0	-8.9	83.8

* Includes traditionally black institutions of higher education which are no longer more than 50 percent black.

Source: Marks, Joseph L., *Higher Education Enrollment, 1982*; Trends in Nation and the South, Atlanta: Southern Regional Educational Board, 1984.

In Florida prior to 1952, four, senior-level, predominantly black institutions of higher education offered programs of study leading to the baccalaureate degree. These institutions were Florida Agricultural and Mechanical College (now Florida A & M University), a four-year, public, traditionally black institution located in Tallahassee; and three private institutions: Florida Memorial College in Miami, Bethune-Cookman College in Daytona Beach, and Edward Waters College in Jacksonville. One, two-year, public community college, Washington Junior College in Pensacola, also existed. Washington Junior College was established in September, 1949, by the Florida Department of Education and Escambia County

Board of Public Instruction. Until 1962, Blacks in Florida were only admitted to historical Florida Agricultural and Mechanical University (Smith, 1960).

Eleven other public community colleges were established between 1957 and 1962 with the primary purpose of providing eductional opportunity for Blacks. See Table 3. Those two-year, or community/junior colleges as they were called, operated under the auspices of the local school boards. All were strategically located adjacent to the local black high schools and in counties where public two-year colleges for whites were located (Community College Council, 1957).

An examination of the mission statements in the annual bulletins published by the black junior colleges indicates that the missions of these schools were synonymous with the missions of the colleges serving white students; and focused on offering university transfer, adult-vocational, and terminal-technical programs (McCray, 1982).

Because of their locations in the centers of the black communities, these community colleges for Blacks provide educational opportunities to many black students. For example, in 1964-65, though two of the colleges, Carver in Cocoa and Collier-Blocker in Palatka had been merged with Brevard and St. Johns River Community Colleges, respectively, the 10 colleges still in existence had a combined enrollment of 5,733 students (SERS Statistical Summary, 1984-65). Total enrollment at the state's 34 institutions of higher education (23 predominantly white and 11 predominantly black) totaled 97,789, of which 8,998 were black). Florida Agricultural and Mechanical University accounted for 3,264 of the black students. It is interesting to note that at the two community colleges for Blacks which had been merged with predominantly white community colleges, the number of Blacks attending the merged institutions declined drastically from pre-merger levels. For example, 147 Blacks were enrolled at Brevard Community College and two Blacks were en-

rolled at St. Johns River Junior College (SERS Statistical Report, 1964-65).

TABLE 3

Location, Opening, and Closing of Public Community Colleges in Florida for Blacks

Institution	County	City	Year Opened	Year Closed
Rosenwild	Bay	Panama City	1958	1966
Carver	Brevard	Cocoa	1960	1963
Washington	Escambia	Pensacola	1949	1965
Jackson	Jackson	Marianna	1961	1966
Johnson	Lake	Leesburg	1962	1965
Suwannee River	Madison	Madison	1955	1966
Hampton	Marion	Ocala	1958	1966
Roosevelt	Palm Beach	W. Palm Beach	1958	1965
Gibbs	Pinellas	St. Petersburg	1957	1965
Collier-Blocker	Putnam	Palatka	1960	1964
Lincoln	St. Lucie	Ft. Pierce	1960	1965
Volusia	Volusia	Daytona Beach	1958	1965

Data obtained from files, Division of Community Colleges.

TABLE 4

Enrollment in Florida Junior Colleges:
Year Black Colleges were Phased-out and Enrollment in Predominantly White Colleges for the Same and Following Year

College	Total Enrollment During Phase-Out Year	FTE	Year Phased Out	Enrollment in Predominantly White Colleges: Year Black CC Closed	Enrollment in Predominantly White Colleges: Following Year
Rosenwild	143	115	1966	2,208	3,545
Carver	143	43	1963	4,273	4,922
Washington	361	302	1965	12,043	12,668
Jackson	443	105	1966	2,442	2,509
Johnson	397	258	1965	874	1,223
Swannee River	250	231	1966	1,151	1,271
Hampton	778	271	1966	3,176	3,299
Rossevelt	218	172	1965	5,259	6,432
Gibbs	887	808	1965	8,870	11,438
Collier-Blocker	72	68	1964	1,398	2,326
Lincoln	667	157	1965	2,238	3,300
Volusia	5,245	429	1965	11,739	14,002

Complied from Division of Community Colleges files.

Walter Smith, former president of Florida Agricultural and Mechanical University and a graduate of Gibbs Junior College (A study of the Black Junior Colleges in Florida: 1975-1966), stated ". . . the black junior colleges filled and educational void for the * * *

Overall, in 1964-65, a total of 1,715 black students were enrolled in predominantly white public institutions of higher education in Florida, compared to an estimated 8,500 attending predominately white colleges and universities in 1965-66. Table 4 presents the enrollment at the predominantly black colleges at the time they were phased out and the enrollment in predominantly white colleges for the same year and for the year following the phasing-out of the black colleges.

Nationally, black enrollment increased only nine percent between 1976 and 1982 (Marks, 1985). Further, since 1976, black student enrollment in postsecondary institutions has lagged behind the total postsecondary enrollment by a larger and larger percentage each year. Similarly, the enrollment of Blacks in elementary and secondary schools increased until 1976, and then began to decline. In 1982, an estimated 75 percent of Whites aged 18-20 were high school graduates, but only 58 percent of Blacks in the same age category were high school graduates (Marks, 1985).

In Florida, data submitted to the Department of Education show that among the 1981-82 ninth graders, approximately 45 percent of the black students did not graduate with their classes in 1985; among white students, the figure was 33 percent. Similarly, black students comprised 18.8 percent of the 1982-83 Florida high school graduates, but only accounted for 9.2 percent of the community college enrollment and 8.7 percent of the state

universities' undergraduate enrollment (Master Plan for Florida Postsecondary Education, 1984).

Another article, "Black Enrollments Heading Down," (AGB Reports, July/August, 1986) also attributes the decline in the number of Blacks attending college to a decrease in the rate of Blacks graduating from secondary schools, differences between the academic preparation and performance of black and white students, and reductions in the buying power of student financial aid. The article also indicates that with America's minority population currently increasing at three times the rate of the white population, early intervention programs (already initiated in many states and school systems), might greatly help under-prepared black high school graduates attain the skills needed for college entry.

In Fall 1978, total black postsecondary enrollment reached 1,055,946, up 21 percent from 1976. Table 5 shows that in the South in 1978, black enrollment was reported to be up 4 percent from 1976.

TABLE 5

Black Enrollment in Postsecondary Education: 1979 and 1978

	1976	1978	Percent Change
Full-Time	659,597	654,604	-0.8%
Part-Time	375,083	401,360	7.0%
Total	1,034,680	1,055,964	2.1%

Source: James R. Mingle's *Black and Hispanic Enrollment in Higher Education 1978: Trends in the North and the South,* Atlanta, SREB.

Table 6 shows the decline in numbers of black high school graduates in college from 1967-82.

TABLE 6

Percent of Black and White High School Graduates, Ages 18-19 in College: 1967-83

Year	Black	White
1987	45.0	53.7
1970	43.1	51.3
1976	49.2	49.2
1980	44.1	49.0
1982	41.1	51.3
1983	38.5	53.2

Source: U.S. Bureau of Census. *Current Population Reports*, Population Characteristics, Series P-20.

Table 7 presents racial and ethnic breakdowns of enrollment in college from 1970-84. Fluctuations appear in the pattern.

TABLE 7

Enrollment in Undergraduate College: Proportions, by Race and Year

	Fall of Year						
	1970	1973	1974	1976	1980	1982	1984
White/Caucasian	88.6	88.5	88.6	86.2	86.0	88.2	85.7
Black/Negro/ Afro-American	9.1	7.8	7.4	8.4	9.2	8.5	9.8
American Indian	0.2	0.9	0.9	0.9	0.8	1.0	0.9
Asian-American/ Oriental	0.9	1.1	0.9	2.0	1.4	1.4	1.6
Mexican-American/ Chicano		1,3	1.5	1.7	2.1	0.9	1.0
Puerto Rican-American		0.4	0.6	0.5	0.9	0.9	0.8

Data derived from The American Freshman: National Norms reports.

Data presented in Table 8 confirm several patterns regarding shifts in black student enrollment. First, access of black students to other than black institutions drastically affected the percentage of black students attending the traditionally black institutions. Further, the percent of black enrollment in the South as a percentage of the total enrollment declined sharply, from 70 percent in 1952 to 42 percent in 1978. Blacks as a percent of the total enrollment in the South declined from 1960-70, but rose to 15 percent in 1976, thereby surpassing the 13 percent high in 1952.

TABLE 8

Total Black Enrollment in the South

Year	Total	Pred. White Inst.	Fred. Black Inst.	Blacks as % of Total Enrollment	# of Blacks Attending Pred. Black Colleges	Black Enroll as % of Total Black Enroll
1952	63,000	—	83,000	13%	100%	70%
1960	84,000	3,000	81,000	10%	96%	50%
1965	134,000	24,000	110,000	10%	82%	49%
1970	245,000	98,000	147,000	12%	60%	47%
1976	426,000	243,000	183,000	15%	43%	41%
1978	442,000	266,000	176,000	15%	40%	42%

Source: Southern Education Reporting Service and Fall Enrollment Reports of U.S. Office of Education, *Fall Enrollment and Compliance Reports of the Higher Education General Information Survey* (HEGIS).

Reasons for Declining Black Student Enrollment

One of the reasons given for the decrease in the number of black students pursuing college degrees is the limited number of black professionals hired by predominantly white institutions. An article in the *Chronicle of Higher Education* (June 13, 1984), states that "virtually no gains are being made in increasing minority repre-

sentation in faculties and administration of predominantly white colleges." Several colleges, however, including Pennsylvania State University, have realized that the success of black students is strongly dependent on the addition of black faculty. Such colleges have recruited black faculty to strengthen their academic programs and to attract black students (*Black Issues in Higher Education*, December, 1984). Overall, though, black faculty representation in non-traditionally black institutions has not advanced much beyond the 2.4 percent of full-time faculty which existed in 1979. At several predominantly white institutions, the percentage of black representation is lower today than it was in the seventies. This is the case at predominantly white Florida State University in Tallahassee (*Tallahassee Democrat*, 1986).

Research and Development Update, a publication of The College Board (May, 1986), outlines some of the possible reasons for the decline in the number of black college students. Among these are the following: limitations or caps placed on enrollment in two-year colleges, increases in tuition prompted by decreases in state funding, declines in enrollment among full-time students, inflation and the need for part-time students to take less credits and work fulltime. Many black high school graduates are also entering the military. Between 1976 and 1984, the number of Blacks entering the army increased by 31.5 percent. During the same period, Blacks entering the Navy increased by 76.7 percent.

The results of a survey of black and Hispanic participation in colleges of the Rochester, New York area attempted to find answers to several factors affecting minority enrollment. These factors included: 1) the extent to which minority enrollment was influenced by admissions policies; 2) the impact of financial aid (both the availability and methodology of awards affect minority enrollment); 3) how remedial and support services affect minority enrollment; and 4) -black faculty repre-

sentation. The study confirmed that in the Rochester area, Blacks represent 5 percent of the total undergraduate population; that as enrollment leveled off, fewer minorities, in proportion to whites, were completing and receiving the baccalaureate degree; and that proportionally more minorities receive financial aid than do whites who usually receive grants, as opposed to loans (Taddiken, 1981).

Several studies have attributed the decline in black enrollment from 1970 to the present to decreasing student aid. According to *Research and Development Update*, (May, 1986):

> The financial situation faced by Blacks considering college attendance has become harsher in the 1980's. Not only has family income failed to keep pace with that of Whites and Hispanics, but the substantial increase in single-head-of-family households (with, therefore, a single wage earner at best), makes it most difficult to accumulate even modest savings for college or realistically to consider paying off monies borrowed to attend college. This disparity in income, combined with the shifting composition of the financial aid package . . . , may be the primary deterrent to black college enrollment.

Arbeiter (1986) quotes two studies which indicate that between 1970-71 and 1984-85, the proportion of grants as part of the total financial aid package decreased from 66.1 percent to 44.6 percent. On the other hand, the loan part of the financial aid package increased from 28.9 percent to 51.7 percent. Black students, according to Miller and Hexter (1985), are less apt to borrow than white students. In fact, the authors found that while two-fifths of the Studet Loan Program (GSL) recipients were whites in the low-income bracket, only one-third of the recipients were low-income minorities. Table 9 from the *Research and Development Update*, May 1986, provides

data on the adjusted student aid by race and institutional type.

The availability of financial aid is extremely important to many black students, especially when one considers that nearly half of all black students desiring to attend college come from families whose yearly incomes are below $15,000. This compares with only 10 percent of college-bound whites who come from families in the same income bracket (*Chronicle of Higher Education*, April 17, 1985). In 1983, the difference in mean family income between white and black families was 43.8 percent, up from 36.3 percent in 1970 (*Research and Development Update*, May, 1986).

According to Morris (1979), blacks and other minorities are highly dependent upon federal funds to aid them in financing their education. Morris quotes data from the Higher Education Institute which estimates that black students rely on BEOG and SEOG four to five times as much as white students. In addition, because many black students work to earn money to remain in college, Blacks are disproportionately represented in college work-study programs.

According to Marks (1985), black student access to predominantly white postsecondary educational institutions pushed the proportion of Blacks in higher education in the South to 15 percent of the totals, still below the black representation in the population, which was 19 percent.

The absence of sufficient black faculty at predominantly white colleges has also been listed as a cause for the declining black enrollment. James Blackwell, professor of sociology at the University of Massachusetts, Boston, has indicated that it is of utmost importance that the pool of black faculty and students be expanded at predominantly white institutions because the success of black students is affected by the social climate of the institution. At the

graduate level, the number of doctorates earned by Blacks has declined each year. According to Blackwell, of the Blacks who received bachelor's degrees in engineering in 1985, 40 percent were earned from nine predominantly black engineering schools. Of the 273 predominantly white engineering schools, only 24 had black faculty numbers (Gaynelle Evans in April 30, 1986 *Chronicle of Higher Education*).

TABLE 9

Adjusted Student Aid by Race, Hispanic Origin, and Institutional Type and Control: 1978, 1983

	1978	1983	% Change 1978-1983
All Schools			
White	$1,168	$1,260	+7.9%
Black	1,945	1,854	-4.7
Hispanic	1,484	1,554	+6.1
Total	1,238	1,317	+6.4
2-Year Public			
White	943	967	+2.5
Black	1,074	1,125	+4.7
Hispanic	870	752	-13.6
Total	950	968	+1.9
4-Year Public			
White	878	934	+6.4
Black	1,779	1,654	-7.0
Hispanic	1,275	1,301	+2.0
Total	970	1,026	+5.8
All Private			
White	2,032	2,348	+15.8
Black	2,844	2,790	-1.9
Hispanic	3,238	3,092	-4.5
Total	2,147	2,421	+12.8

Source: CIRP; 1978, 1983 and reproduced in Lee, John B., et al., "Student Aid and Minority Enrollment in Higher Education," p. 18.

Shifts in Enrollment Patterns of Black Students

Any discussion of black enrollment in postsecondary educational institutions must consider the impact of two-year colleges on enrollment patterns. The mission of two-year colleges, access (open door policy), location within the community, and flexible scheduling of courses have been and remain relevant factors in the decline of full-time student's enrollment in four-year institutions. The number of black students attending two-year colleges continues to escalate, but the dropout rate, especially among black students, is higher at two-year colleges than at four-year colleges (*Chronicle of Higher Education*, April 17, 1985).

Morris (1981) asserts that in 1978, 41 percent of the black students attending postsecondary institutions were enrolled in two-year colleges. As the result, Blacks represented 10.9 percent of the total two-year college enrollment and only 8.4 percent of the four-year enrollment.

Hill (1984) states that in 1980, a total of 42 percent of the more than one million black college students were attending two-year institutions. Many students attended part-time or were not pursuing a program of studies leading to a degree; however, 34 percent of the black, full-time, undergraduate-seeking students wore attending two-year colleges in 1980.

Griggs (1980) cites the results of a study conducted by the American Council on Education and reported in the November, 1972 Harvard Education Review. The study revealed that 62 percent of the students attending public two-year colleges came from families whose annual income was under $12,500, compared to students at public universities where only 44 percent of the students enrolled were from families with an annual income under $12,500. According to Griggs, "the community college represents a big holding operation for those students who cannot afford to go to a senior institution."

According to Marks (1984), part-time enrollment growth rates have doubled the growth rates of full-time enrollment. This was evidence in 1982 when part-time students represented almost four of every ten students enrolled in southern postsecondary educational institutions. Table 10, from Marks' publication entitled, *Higher Education Enrollment, 1982: Trends in the Nation and the South* (1984), indicates that increases in black enrollment have been attributed to part-time students.

TABLE 10

Black Headcount Enrollment of Part-Time And Full-Time Students, Fall 1982; Percent Change 1980-1982 and 1976-1982; Percent of Enrollment Black, 1982 United States and SREB States

	Black Headcount Enrollment 1982	Percent Change 1980-1982	Change 1976-1982	Percent Of Enrollment Black 1982
United States	1,103,517	-0.4	6.7	8.8
Full-Time	667,428	-2.7	1.2	8.1
Part-Time	436,089	3.3	16.3	8.3
SREB States	462,195	0.2	8.6-	14.0
Full-Time	313,954	-2.5	1.6	15.5
Part-Time	148,241	6.6	27.2	11.6

Source: Southern Regional Education Board, 1982.

In 1978, a total of 87.016 black undergraduate students were enrolled as part-time students at public four-year insittutions, compared to 224,490 at public two-year colleges (Mingle, 1980).

In 1970, Blacks and Whites graduated from secondary schools at rates of 65 and 83 percent respectively. However, by 1974, the black/white graduation rate was 72 percent for blacks and 85 percent for whites. In addition, in 1970, approximately 15 percent of the Blacks between

the ages of 17-24 were attending college, compared with 27 percent of whites in the same age category (National Center for Education Statistics, 1978). In addition, Morris (1981) contends that since 1976, black enrollment at the undergraduate level no longer increases although the enrollment of all other minorities except Native Americans continues to increase.

According to Hill (1984), during the 1976 spring term, a total of 1,233,000 Blacks were enrolled in college, with 1,080,000 enrolled at the undergraduate level. Blacks, ages 18-24, had lower college enrollment rates than all other high school graduates. Further, Hill states that almost 22 percent of all blacks, ages 16 and above, enrolled in postsecondary institutions in spring 1976, were enrolled in adult education centers, vocational centers, CETA or correspondence courses, commonly termed "noncollegiate institutions." Blacks composed 12 percent of the total enrollment in non-collegiate institutions, a percentage much greater than their 10 percent proportion of the total population. Available data also indicate that even in secondary schools, black students are "under-represented in academic programs and over-represented in vocational education programs," may of which lead to low-status occupations (Chronicle of Higher Education, April 17, 1985).

In 1952, the majority of all college black students were enrolled full-time, primarily at residential institutions. However, in the South, by 1978, full-time enrollment among Blacks had declined by 8.2 percent in total head count and part-time enrollment was up nearly 27 percent, a gain of 6 percent in total head count. Nationally, two-year institutions enrolled 42 percent of all black post-secondary students, compared to 34 percent of the whites. In the south, 23 percent of all white students in higher education were attending community colleges, compared to 37 percent of all Blacks (Mingle, 1980).

Data collected by the U.S. Department of Education and reported in the Chronicle of Higher Education, (July 23, 1986), show that in 1984, while 35.1 percent of all students were enrolled in public two-year colleges, 39 percent of the black students attended public two-year colleges. Black students were least represented in two-year private colleges, with only 3.7 percent in attendance. Griggs (1980) states that a study conducted by Howard University researchers—Institute for the Study of Education Policy—(ISEP) 1976, found that in 1973, Blacks were "disproportionately represented in two-year and junior colleges and in less prestigious four-year colleges." In Florida, Griggs reports that between 1970-7[illegible], the proportion of Blacks in community colleges increased 7 percent while the percentage of whites in Florida colleges decreased 3 percent. In 1977, a total of 78 percent of the black high school graduates who attended college in Florida enrolled at a community college.

Community colleges offered many benefits. They offered Blacks who could not afford to matriculate to a four-year institution the oppportunity to remain fully employed, while concurrently attending college, usually as a part-time student at night. Furthermore, nontraditional students, those who had been out of school for several years, accounted for much of the increase in part-time enrollment in the community colleges. Tuition was also more affordable at the community colleges. Blacks who simply wanted to take one or two courses found it convenient and more economically advantageous to enroll in community colleges. The selective admissions standards of four-year colleges, especially in a two-tiered system such as exists in Florida, limits student enrollment at the freshman and sophomore levels and thereby forces many students who want to attend a four-year institution to begin their studies at a community college.

Students' avocational interests are beginning to shift from those previously held in high esteem, such as education and the arts and sciences, to occupational and technical areas. This shift, in part, may be attributed to current employment trends. The lowest employment rates for Blacks are in health occupations and physical sciences. Blacks, to a great degree, are concentrating their studies in these areas: education, humanities, and the social sciences. In all three areas, unemployment is high and salaries are low (*Chronicle of Higher Education*, April 17, 1985). Again, the comprehensive mission of the community colleges, "being all things to all people," enabled students to enroll in one or several courses to pursue associate-level academic or occupational offerings, or courses at the certificate level. In short, students are finding that their short-term goals may be attained more easily if they enroll in community colleges.

Black enrollment patterns demand a look at the sex of students. Nationally, black male enrollment in postsecondary institutions continues to decrease. Marks (1984) confirms the notion that the majority of students enrolled in higher education since the fall of 1980 have been women. Historically, he notes, black women have "constituted a majority of black enrollment." Also, in terms of graduation rates of Blacks between 1976 and 1981, the number of degrees at every level declined for black males, while the degrees awarded to black females increased at all except the master's level. Table 11, from Susan Hill's article entitled, "Participation of Black Students in Higher Education: A Statistical Profile from 1970-71 to 1980-81," presents the number and type of degrees awarded to Blacks in 1976 and 1981.

TABLE 11

Degree Awarded to Blacks, by level:
1976 and 1981

Degree level	1976		1981	
	Awards to Blacks	Blacks as a percent of all recipients	Awards to Blacks	Blacks as a percent of all recipients
Total	83,400	8.3	82,000	6.2
Bachelor's	59,100	6.4	60,700	6.5
Master's	20,300	6.6	17,100	5.8
Doctor's	1,200	3.6	1,300	3.9
First-Professional	2,700	4.3	2,900	4.1

Source: Integrated Education, Jan./June, 1984, p. 53-60.

Table 12 also from Hill, presents the percentage change from 1976 to 1981.

TABLE 12

Percent change in degrees awarded to
Blacks and Whites, by degree level and sex:
1976 to 1981

Degree Level	Blacks		Whites	
	1976	1981	Percent Change 1976 to 1981	Percent Change 1976 to 1981
Bachelor's				
Men	25,600	24,500	-4	-9
Women	33,500	36,200	+8	+9
Master's				
Men	7,800	6,200	-21	-17
Women	12,500	11,000	-12	+1
Doctor's				
Men	800	700	-10	-17
Women	400	600	+29	+31
First-professional				
Men	2,000	1,800	-12	*
Women	700	1,200	+71	+99

* Less than 0.5 percent.

Source: Integrated Education, Jan./June, 1984, pp. 53-60.

Fleming (1984) contends that on integrated campuses, it is the black male who experiences the greatest number of interpersonal conflicts and who suffers most as a result of the interracial educational environment. Black female students, on the other hand, experience feelings of incompetence and dissatisfaction with their performance. Female students also had the tendency to experience more anxiety during competitive situations, and they usually set goals considerably lower than those of black men.

Hill (1984) indicates that women account for 53 percent of the total black noncollegiate enrollment and women also comprise a large proportion of black part-time students who attend noncollegiate institutions. Overall, however, black students are more likely than whites to enroll in special education programs and less likely to enroll in accelerated programs, such as those for talented and gifted students. In both college and secondary schools, black students usually enroll in courses and programs that differ in kind and content from those of white students. Such programs are usually less challenging and less likely to stimulate or develop higher-order cognitive skills and abilities (*Chronicle of Higher Education*, April 17, 1985).

Another article in the *Chronicle of Higher Education* (January 8, 1986), urged state educators to begin new programs designed to insure the preparedness of black high school students for postsecondary education. The call for new programs was made after a Southern Regional Education Board report revealed that the increase in black student enrollment between 1976 and 1982 was only 6.1 percent. This was a marked decline from the 24.6 percent increase in black student enrollment from 1966 to 1976.

Even as early as 1978, the Institute for the Study of Education Policy had indicated that for affirmative action programs to work, Blacks had to remain in school and major in a wide range of academic disciplines. The Institutes stressed the importance of black faculty at predominantly white institutions, and urged the continuation

of special minority admission programs, as well as the provision of adequate financial aid for minority students.

With more and more women over 30 attending college, institutions have been forced to shift the focus of their recruitment activities, as well as the types of supportive services offered. It is important, however, to note that the numerous special programs for minorities which were instituted during the late sixties and early seventies have dwindled. In 1976 only about 38 percent of the colleges surveyed by Sedlacek and Webster indicated that they offered special programs for minorities, compared to 62 percent in 1974. A Southern Regional Education Board publication entitled *The College and Cultural Diversity* (October, 1971) details special services which predominantly white colleges in southern states were offering to assist in the recruitment of black students and their adjustment to college life. Emphasis now appears to be focused on assimilation. The same study found that in 1976, little emphasis appeared to have been placed on a student's high school grade point average or on the results of standardized tests, such as the SAT or ACT, in the admissions process for Blacks. In 1986, however, admission test results are beginning to play a greater role in the admissions process of all students. Further, test results, in many instances, are used as the sole criterion for placing students. In 1976, high school grade point average was considered by only 12 percent of the schools which admitted black to special programs, compared to 55 percent in 1969 (SREB, 1971).

According to Morris (1981), the majority of black students attending college have now shifted their enrollment from the traditionally black institutions to one of the approximately 3,000 traditionally white or newly majority-black institutions. In 1968, traditionally black institutions enrolled one-third of the approximately 434,000 black students in higher education. A decade later, slightly less than 17 percent of the one million black students were attending traditionally black institutions of higher learning.

So great has been the shift of black student enrollment from traditionally black institutions to predominantly white institutions, that some educators fear the demise of the black college, as well as drastic decreases in overall black enrollment. Marks (1985), states:

> Fewer black students will be enrolled in college in 1990 than today if present trends continue—and, black students will make up a smaller proportion of overall college enrollment. From the mid-1960s to the mid-1970s, the number of black students enrolling in colleges and universities rose dramatically. The relative proportion of black students in total enrollment reached record highs. In the late 1970s, however, the rates of increase in the enrollment of black students unexpectedly began to decline, and black students as a portion of total enrollment decreased. The result is that the 1980s are developing into a period of stable or declining numbers and proportions of black students in colleges and universities. (p.)

On the other hand, Hodgkinson (*Standard Education Almanac*, 1984-85) states that black enrollment in public schools is up and educators need to exhaust all revenues in making sure the largest possible number of minority students finish high school and become eligible for college. Hodgkinson warns that if significant numbers of black high school students do not graduate from high school or do not attend college, "the potential decline in the college cohort would not be 24 percent for the nation in 1990, but could be twice that."

In 1980, a total of 14.6 percent of the students attending college in the Southern Regional Education Board (SREB) states were black. In the SREB states (Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia and West Virginia), Blacks represented 18.7 percent of the total population in 1980 (Myers, 1982).

Results of a study conducted by the National Center for Education Statistics (1984-85) and referenced in the

Standard Education Almanac, show that college enrollment increased from 9.2 million in the fall of 1982 to 12.4 million in the fall of 1982. Chart 1, which follows, shows the differences in the enrollment rates of the white and nonwhite students, of different, age groups, enrollment by type of institution. Clearly, the enrollment growth rate was highest among Blacks and other races. In 1972, Blacks and other races constituted 10.4 percent of the total college enrollment, compared to 14.3 percent in 1982.

On overall minority enrollment at the postsecondary level, Sedlacek and Webster (1977) observe that public institutions have not been as successful as private institutions in recruiting or retaining students. Of the 4 or 5 percent of freshmen who enrolled in public institutions in 1975, only 2.5 percent returned the next year. However, of the 6 to 7 percent of black freshmen who enrolled in private institutions, approximately 6.3 percent returned the second year. Sedlacek acknowledges, though, that over the years private schools have generally attracted a greater percentage of black students than have public institutions. The private institutions which have been most successful in recruiting black students have emphasized academic programs. Least successful institutions have generally emphasized financial benefits to students.

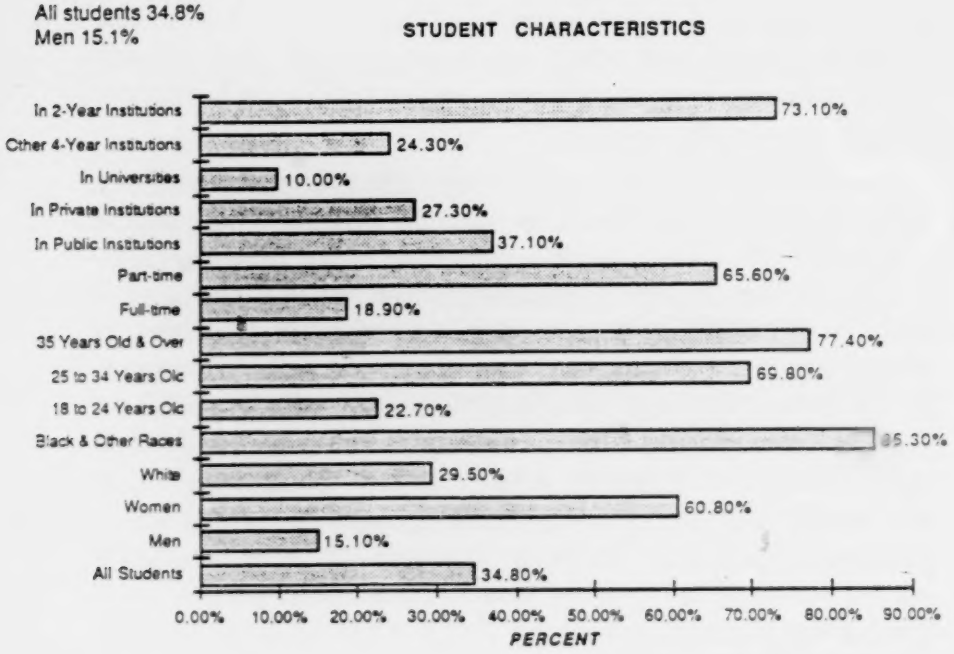
Data from the Higher Education Research Institute (1982) also indicate that white college students are more likely to complete the baccalaureate degree in the traditional four years than are black students. Hart (1984) confirms this fact and cites the results of a national longitudinal study. This study revealed that 34 percent of the white, 24 percent of the blacks, 18 percent of the American Indians, and 13 percent of the Hispanics who initially enrolled in undergraduate programs in 1972, earned the baccalaureate degree by 1976. After the traditional four-year period, the degree completion rate improved for both black and white students to 51 and 56 percent, respectively.

CHART 1

Percentage increases in the enrollment of college students with selected characteristics: United States, fall 1972 to fall 1982

Student Characteristics

All students 34.8%
Men 15.1%



Sources: Data by race and by age are derived from the current population surverys for the Bureau of Census, U.S. Department of Commerece. All of the other statistics are from the fall enrollment surveys of the National Center for Education Statistics, U.S. Department of Education.

The research study conducted by Charles M. Grigg (1980) reveals that in Florida, both the percentage and number of Blacks at all levels of postsecondary education has declined. Grigg's study also indicates that a larger proportion of white students earn associate of arts degrees and continue their studies at the state public universities than do black students and that a higher proportion of the white students who transfer to state universities complete their studies than do blacks.

Nationally, according to Claffey (1981) and Brazziel (1980), the traditionally black colleges and universities have been more successful than their white counterparts in helping students obtain the baccalaureate degree. Hart (1984), using what he terms an effectiveness quotient (EQ), identified the top ten postsecondary institutions in the country which produced the most baccalaureate degree recipients and the top five traditionally black institutions that produced the largest number of baccalureate degree recipients. Hart's list of colleges consistently placed in the top between 1972-73 and 1980-81, follows in Table 13.

TABLE 13

Top Ten Institutions in Effectiveness, 1972-73 to 1980-81

Institution	State	Years in Top 10
Simmons College*	MA	5
Harvard College	MA	5
Dartmouth College*	NH	5
Yale University*	CT	5
Rice University*	TX	4
East Texas State	TX	3
Southern University	LA	3
Connecticut College*	CT	3
Notre Dame University*	IN	3
Athens State College	AL	2

* Designates private institutions

PERSISTENCE RATE AND SUCCESS OF BLACK STUDENTS

As Chart 1 indicates, private, selective colleges and universities dominate among those institutions which Hart determined have been consistently effective in awarding black baccalaureate degrees.

Hart's list of most-effective traditionally black colleges from 1972-73 to 1980-81 contained five institutions: *Fisk University in Nashville,* Tennessee; South Carolina State University in Greensboro; Southern University in Baton Rouge, Louisiana; Tuskegee University in Tuskegee, Alabama; and Lane College in Jackson, Tennessee.

From his research, Hart (1984) concluded that traditionally black institutions "are generally more consistent performers in terms of institutional effectiveness in the production of black baccalaureates than traditionally white institutions (p. 5).

On the success of colleges in educating black students, several writers have praised the traditionally black institutions, especially given the fact that these colleges have historically admitted students who were underprepared. Therefore, these students would not have met the admissions standards at predominantly white colleges where the selection criteria are usually higher. Black colleges have also offered strong supportive services to enhance students' success (Miller, 1981; Blackwell, 1981). The strength of black colleges in *graduating black students is evident in the number of black professionals who are products of traditionally black* colleges.

Allen (1986) notes that black students on predominantly white campuses are not as successful as white students. In addition to having a higher attrition rate, black student enrollment in postgraduate programs is low, compared to the number of white pursuing postgraduate degrees. Further, black students on white campuses usually have lower grade-point averages and experience

more academic problems than do their white counterparts. Much of this lack of success may be linked to the black student's inability to adjust, inadequate academic background, alienation on campus, poor advisement, or even to the absence of black faculty to serve as role models. This, however, is not to imply that all black students in predominantly white institutions are unsuccessful and/or experience academic difficulties.

Austin (1981) asserts that, generally, black students attending traditionally black colleges have lower standardized test scores and are less prepared academically than are the typical black students on white campuses. In addition, many of the parents of black students who attend traditionally black institutions are employed in low-paying positions, have less money and have less formal education than do the parents of the typical black students who enroll in predominantly white institutions. Thus, the mission of traditionally black institutions is complex: They are expected to remediate these students' deficiencies and prepare them for employment, despite less adequate facilities and fewer financial resources (Miller, 1981; Williams 1981).

A study conducted in 1979 by the National Advisory Committee on Black Higher Education found that in 1977, among students 18 to 24, there were more dropouts than there were black college enrollees. Even in 1979, of the black students determined by their SAT scores to be among the most academically able, only 13 percent were enrolled in black institutions.

Further, Hart's results appear to indicate that private institutions are more effective than public institutions in the number of baccalaureate degrees awarded. Other factors which contribute to program effectiveness include: the existence of special admissions programs, the percentage of black faculty, the quality of the financial aid program, and the pupil-staff ratio.

Regarding persistence of black college students in obtaining the baccalaureate degree, Austin (1977) concluded that living in a dormitory during the freshman year is the most important environmental factor associated with college persistence. Other important factors that positively affect student persistence are involvement in campus activities and strong parental support. On the other hand, persistence is reduced by poor academic performance and by attendance at a two-year college.

At almost every level of education, the drop-out rate among black students is higher than among white students. For instance, in 1972, black students accounted for 10.5 percent of the high school graduates, but only 8.7 percent of the high school graduates, but only 6.5 percent of the baccalaureate degree recipients, and in 1979, only 4 percent of the doctorates and professional degrees were awarded to Blacks (April 17, 1985, *Chronicle of Higher Education*).

A study conducted by the Institute for Services to Education (1979) concluded that while black students at historically black colleges initially scored low on standardized tests, these students were capable of achieving their career and educational goals, despite their initial low scores. Hart (1984) quotes Miller and others (1977) who concluded that the primary factors which influence student enrollment are "geographic location, and the strength of the tutoring, counseling, and social, academic, and cultural programming services available to minority students." (p. 9)

Fleming (1984) states that black students who attend traditionally black institutions, though initially behind academically, overtime, achieve high academic gains and intellectual development. Also, in terms of psychosocial development, students on black campuses appear to be better adjusted, have positive self-images, take pride in themselves and in their race and also have aspirations (Allen, 1986).

Concerning the performance of black students, one study states that black students on black campuses achieve higher grade-point averages are actually enjoy college more than their peers who attend white colleges (*Report on Education Research*, July 2, 1986). Recommendations outlined to improve the academic success of black students on white campuses include more enrichment programs, better articulation between secondary schools and colleges, better orientation programs and more black faculty. In short, black students need to become acquainted with post-secondary education requirements while they are still in high school so that they can plan to pursue high school courses in an academic track leading to college preparation.

A study conducted by Gail Thomas (1984) analyzed students' early childhood, family, elementary and secondary school training and their educational goals, to determine why they had selected certain majors. The results of the study revealed that blacks make decisions about their majors long before they enter college. The majors which black students select are influenced by subjective factors. Thomas found that students' sex, vocational expectations and personal interests were the major factors which influenced their selection of a major field of study. Trent (1983) states that black females continue to select majors in education, the social sciences, and nursing. Hill (1984) reports that the number of Blacks receiving degrees in education and the percentage representation of Blacks in education declined between 1976 and 1981. Black representation, as a percent of all first-professional degree recipients increased in the following disciplines: theology, dentistry, podiatry, pharmacy and veterinary medicine. Persell (1977) asserts that Blacks and females have a tendency to enroll in large numbers in non-academic courses in high school. Therefore, they do not have the necessary prerequisites to pursue non-traditional college majors. Coleman and others (1981), state that high

school students who attend private schools have greater access to science and mathematics courses and generally are more prepared and more likely to pursue studies in these areas once they attend college.

According to Mednick and others (1975), Blacks and females are more prone to select majors which lead to careers in which they feel they will experience less racial or sexual discrimination.

Allen (1986) quotes Gurin and Epps (1975) who studied the difference in the college expectations of men and women and found:

- Women's goals were lower on all measures of educational and occupational aspirations.
- Males were three times more likely to plan to pursue the Ph.D. degree.
- Women were more likely to aspire to jobs in the "female sector" of the economy, jobs requiring less ability and effort while offering lower prestige.
- Males were more likely to be influenced in their goals and aspirations by the college attended (p. 23).

According to Allen, black men attending black colleges and white men attending white colleges are more likely to reap greater rewards from college than black women. Another study conducted by Allen and summarized in the *Report on Education Research* (July 12, 1986), found that Blacks attending predominately black colleges were more successful in attaining their educational goals than their counterparts who attended predominantly white colleges. This success rate, however, must be measured against the lower occupational levels Blacks in black colleges aim for, while Blacks attending white colleges aim for higher level, more prestigious occupational choices.

Sedlacek and Brooks (1976) reviewed predictor studies useful in ascertaining information on the success or lack

of success of black students in large universities. They concluded that seven major variables, all noncognitive, should be considered in predicting the success of minority students or in identifying problems encountered by minority students. These variables are: positive self concept, ability to understand and deal with racism, realistic self-appraisal, preference for long-range over short-term goals, successful leadership experience and demonstrated community service and the availability of a strong support person.

Hodgkinson's and other researchers' comments underscore the importance of articulation between secondary and postsecondary education officials. High school students need to know postsecondary education requirements while they are still in high school in order to pursue the appropriate track (academic vs. vocational or work experience), which leads to college admissions. A *Chronicle of Higher Education* article on the decline in enrollment of black students quoted on SREB survey which found that a higher percentage of white high school students pursue college preparatory programs than do Blacks. For example, 81 percent of the white high school seniors surveyed reported having taken one year of algebra and 50 percent reported having taken two years. Among black high school seniors, 68 percent had taken one year of algebra and 39 percent two years. The study concluded that there is "a persistent gap between the academic preparation and performance levels of black and white students."

A study concerning course offerings conducted by Linda Darling-Hammond and summarized in the *Chronicle of Higher Education* (April 17, 1985), revealed that in 1981, fewer college-bound students took courses in math, physical science, and social science. The math courses taken focused on general skills rather than specialized skills learned in geometry, algebra, or calculus.

The number of black students taking the SAT has declined since 1980. That decline could be responsible for the placement of black students in special remedial programs since many colleges are requiring a student score for regular admission; a certain percent of the students who fall below the cut-off may be granted a conditional admission, as in Florida. The conditional admission is based on other criteria in conjunction with the test score. The decline in the number of students taking the standardized tests appears to be linked to the decline in the number of black students who actually attend college. In 1980 there were 77,000 students who took the SAT. By 1985, however, the total had declined to 70,000.

While Blacks have gained greater access to traditionally white institutions within the last 25 years, Hart (1984) maintains that access is still a problem because of black underrepresentation in white institutions. Hart cites Blackwell (1981) who contends that there are three levels of access: "weak or limited, approximate, and equal access (p. 26)." Black access to traditionally white institutions, according to Blackwell, is negatively affected by several factors including the black unemployment rate, low income and occupational status, limited financial aid and hesitancy to borrow money to finance education.

COMMUNITY COLLEGES

This section of the study is devoted to the Community College System. The analysis summarizes and highlights each community college's enrollment and degrees awarded to the total population and to black students. The observation period consists of 1976 through 1985 and the academic years 1976-77 through 1984-85.

The primary data are presented in two tables in the following order for each community college:

1. The first table contains opening fall enrollment for the college's total population and for black students.

This table also contains the percentage of the total population that black students represent.

2. The second table contains the total degrees, associate in arts degrees and associate in science degrees awarded by the college to its total population and to its black students.

Secondary data are provided in Appendices A, B, C, and D. They are offered as an alternate form for studying the same data contained in the first and second tables for each community college. The data in the Appendices are presented in the following order for each community college:

- Figure 1 in Appendix A shows graphic enrollment data for the college's total population.
- Figure 2 in Appendix B shows graphic enrollment data for the college's black student population.
- Figure 3 in Appendix C shows graphic data for the total degrees, associate in arts degrees and associate in science degrees awarded by the college to its total student population.
- Figure 4 in Appendix D shows graphic data for the associate in arts degrees and associate in science degrees awarded by the college to its black student population.

BREVARD COMMUNITY COLLEGE

Table 14 indicates that over ten fall terms, except for 1978, the college's enrollment gradually increased through 1982. During the 1978 term, the enrollment declined 2 percent. This decline continued through 1979 when it rose to 6 percent. During the fall term of 1982, the col lege's enrollment declined. Then enrollment increased by 2 percent the next term. Enrollment declined 13 percent from 1983 through 1985.

The college's black enrollment was at its highest in 1977. The college's higher percentage of black students was 10 percent of the total enrollment for that term. In 1981, at the height of the college's overall enrollment, the number of black students enrolled declined. From 1981 to 1985 enrollments declined 28 percent. See Appendices A and B.

According to the data in Table 15, the college awarded more degrees in the 1981-82 academic year than in the 1980-81 academic year. The data also indicate a decline of 20 percent in 1982-83 from 1981-82. This decline continued through the academic year 1984-85. Total number of awards declined by 52 percent from 1981-82 through 1984-85.

The number of associate in arts degrees awarded appeared to parallel the overall total number of degrees awarded. However, the number of associate in science degrees awarded remained rather constant over the nine year observation period.

The data in Table 2 also indicate that the trend of degrees awarded to black students varied substantially from that of the total population. In 1978-79, the college awarded 50 associate in arts degrees to Blacks, the highest during the observation period. As the number of associate in arts degrees declined between the years 1978-79 through 1984-85, the number of associate in science degrees awarded increased in 1981-82, before declining each year through 1984-85.

The college awarded 747 associate in arts degrees in 1984-85. Of this number 15, or 2 percent, were awarded to black students. Of the 298 associate in science degrees awarded by the college, 15, or 3 percent, were awarded to black students.

* * * *

FLORIDA COMMUNITY COLLEGE SYSTEM

During the observation period 1976 through 1985, the system wide enrollment increased each year from 1976 through 1982. Enrollment declined slightly in 1983. It also declined again by four percent in 1984. In the 1985 fall term, most enrollments were also up over the 1984 fall term.

The enrollment of black students increased 10 percent in 1977 over 1976. Black enrollment declined by 30 percent through the 1984 fall, term followed by an increase in 1985 fall term. (See appendices A & B)

The number of associate in arts degrees awarded remained constant over the first six years. The number increased by 13 percent in 1981 82 over 1976-77, leveled off for the next two years and declined in 1984-85. The number of associate in science degrees awarded gradually increased during the observation period.

The number of associate in arts degrees awarded to black students increased 20 percent in 1977-78 over 1976-77. The number of awards declined over the next three years. By 1984-85, the total number of associate degrees awarded to black students declined 46 percent from the 1976-77 academic year. (See appendices C and D).

The number of Hispanic students enrolled in community college surpassed black students in 1981. (See table 71).

Miami-Dade Community College awarded 30 percent of the associate in arts degrees to Blacks during the observation period, and approximately 20 percent of all associate in arts degrees in the community college system (See appendix A).

COMMUNITY COLLEGE TRANSFER ENROLLMENT AND GRADUATION TRENDS IN THE UNIVERSITY SYSTEM 1976-77-1984-85

This section of the analysis focuses on the community college transfer students (Florida-resident classified students), entering the State University System from one of the 28 public community colleges in Florida. Specifically, these variables are analyzed: retention, attrition and graduation rate of community college transfer students and Black students during the observation period (academic years) 1976-77 through 1984-85).

An analysis for each academic year will be followed by a table showing the number of community college transfer students by race. Each table tracks the community college transfer student and shows the retention, attrition, and year-end graduation rate.

The data are presented in tables in the following order for each year of the observation period.

1. Table 7, refiects the numbers of community college transfer students enrolled in predominantly white institutions and Florida Agricultural and Mechanical University from 1976-77 through 1984-85.
2. Breakouts for the period 1976-77 through 1980-81 for community college transfer students graduating after six years.
3. One table for the period 1981-82 for community college transfer students graduating after five years.
4. One table for the period 1982-83 for community college transfer students graduating after four years.
5. One table for the period 1983-84 for community college transfer students graduating after three years.
6. One table for the period 1984-85 for community college transfer students graduating after two years.

The overall community college transfer student enrollment to the SUS (Florida-resident classified students) declined by 15.1 percent during the observation period.

Hispanic community college transfer student enrollment declined in 1984-85 by five percent; however, overall enrollment in this category increased during the observation period by 30.4 percent. Hispanics surpassed Blacks as the largest minority of community college transfer students entering the SUS in 1981.

White community college transfer student enrollment also declined in 1984-85 by four percent. For the total observation period, such enrollment declined by 17 percent.

Black community college transfer student enrollment declined by six percent from 1983-84 to 1984-85. Black community college transfer student enrollment declined by 37.8 percent during the observation period. The largest decline in black community college transfer students occurred during academic years 1978-79 (14.4 percent), 1980-81 (10.3 percent) and 1981-82 (11.5 percent).

Black community college transfer students who enrolled at Florida Agricultural and Mechanical University (FAMU) represented approximately 11 percent of all black comunity college transfer students in the SUS Community college transfer students were not disproportionately enrolled at FAMU.

COMMUNITY COLLEGE TRANSFER STUDENTS ENTERING THE SUS IN 1976-77

During the academic year 1976-77, there were 16,125 community college transfer students (Florida-resident classified students) who entered the SUS (Table 72). At the end of the year, 99.4 percent of the community college transfer students who entered in 1976-77 were still enrolled; 0.61 percent had graduated. By the end of the second year, 62.8 percent were still enrolled; 17.5 percent

had graduated; and 19.7 percent had dropped out (attrition) for various reasons. This attrition rate increased to a high of 38.3 percent by the end of the sixth year. White community college transfer students showed the lowest attrition rates from 19.7 percent at the end of the second year to a high of 37.1 percent at the end of the sixth year.

More Hispanic community college transfer students persisted longer than any other minority group. Whites and non-Hispanic minorities seem to graduate faster than both Hispanics and blacks. Hispanics and Blacks graduated fewer than 50 percent of their respective groups at the end of six years. However, 74.4 percent of the 9,135 community college transfer students who graduated by the six year mark, did so by the end of the third year. Approximately 75.3 percent of the White community college transfer students who graduated within six years did so by the end of the third year. Blacks followed with 68.6; Hispanics with 65 percent.

Black community college transfer students had the highest attrition rate and the lowest graduation rate among community college transfer students.

COMMUNITY COLLEGE TRANSFER STUDENTS ENTERING THE SUS IN 1977-78

The number of community college transfer students entering the SUS during the academic year 1977-78 declined by two percent from 1976-77. At the end of the first year, 99.8 percent of the community college transfer students were still enrolled in the SUS, with 0.21 percent graduating. At the end of the second year 63.2 percent were still enrolled. 15.5 percent had graduated and 21.2 percent had dropped out (attrition) for various reasons. This attrition rate increased to a high of 38.3 percent at the end of the sixth year; a rate identical with with

that of the community college transfer students who entered the SUS in 1976-77.

White community college transfer students had the lowest attrition rate (37.1 percent) and the highest graduation rate (57.7 percent) after six years. Hispanics continued to persist longer with the larger percentage still enrolled at the end of each year. Hispanics had the lowest attrition rate for the first three years (28.9 percent); and the second highest graduation rate (39.9 percent), at the end of the six year period. Black community college transfer students had the highest attrition rate (48.6 percent) and the lowest graduation rate (45.1 per cent). Blacks were the only group of community college transfer students who had less than a 50 percent graduation rate.

In 1977-78, there were 15,803 community college transfer students entering the SUS, and 8,867 or 56.1 percent graduated by the end of the sixth year. However, 72.3 percent of the 8,867 who graduated, did so by the end of the third year. Seventy-two (72) percent of whites, 72 percent of Blacks, 70 percent of Hispanics, and 67 percent of other minorities had graduated by the end of the third year.

COMMUNITY COLLEGE TRANSFER STUDENTS ENTERING THE SUS IN 1978-79

Community college transfer student enrollment declined by 10.3 percent during the 1978-79 academic year. At the end of the first year, 99.7 percent of the community college transfer students were still enrolled in the SUS, and 0.33 percent had graduated. By the end of the second year, 63.2 percent of the community college transfer students were still enrolled, 15.1 percent had graduated, and 21 percent had dropped out. Of the 14,136 who entered the SUS, 56.3 percent or 7,979 had graduated at

the end of six years. By the end of the third year, 72.4 percent of 5,780 had graduated.

At the end of six years, while community college transfer students had the highest graduation rate (57.5 percent) and the lowest attrition rate (36.8 percent).

Hispanic commmunity college transfer student graduation rate was 51.5 percent. Their attrition rate was 41.7 percent at the end of six years. A tthe end of three years, 66.9 percenut of the Hispanics had graduated; however, they had the second highest percentage of students still enrolled at the end of six years.

For the first time, other minorities had the second highest graduation rate, 53.6 percent, and the second lowest attrition rate, 40.1 percent, at the end of the six year period. However, at the end of the three years, they had the lowest graduation rate, 64.9 percent.

Black community college transfer students had the lowest graduation rate, 47.7 percent, of all transfer students and the highest attrition rate, 44.9 percent, at the end of six years.

Blacks did, however, have the highest graduation rate, 72.4 percent at the end of three years, as well as the highest percentage 7.4 percent, of students still enrolled. Black community college transfer students were the only group to have less than 50 percent of their students graduating at the end of the six years.

COMMUNITY COLLEGE TRANSFER STUDENTS ENTERING THE SUS IN 1979-80

In the 1979-80 academic year, 13,744 community college transfer students (Florida-resident classified students) entered the SUS. This number represented the third consecutive year of decline in community college transfer student enrollment. By the end of the first year, 99.7 percent of the community college transfer students

who entered in 1979-80 were still enrolled and 0.28 percent had graduated. At the end of the second year, 66.2 percent of the community college transfer students were still enrolled, 14.2 percent had graduated and 19.6 percent had dropped out (attrition) for various reasons. The attrition rate increased to a high of 37.8 percent at the end of six years. White community college transfer students had the lowest attrition rate (36.4 percent) at the end of six years, followed by other minorities (37.7 percent), Hispanics (39.7 percent) and Blacks (50.6 percent) with the highest attrition rate.

Hispanic community college transfer students persisted longer and had a larger percentage of students still enrolled at the end of each year. There were 107 more black commuity college transfer students than hispanic community college transfer students, but 51 more Hispanics graduated than Blacks. The white community college students graduation rate at the end of six years was 58.1 percent; other minorities, 54.5 percent; Hispanics, 52.1 percent; and Blacks 42.1 percent.

Most of the community college transfer students (66 percent) graduated by the end of their third year. Approximately 67 percent of the white community college transfer students graduated within three years, followed by 63 percent of blacks, 60 percent of Hispanics and 61 percent of other minorities.

Black community college transfer students continue to have the highest attrition rate and the lowest graduation rate of all groups.

COMMUNITY COLLEGE TRANSFER STUDENTS ENTERING THE SUS IN 1980-81

Community college transfer students (Florida-resident classified students) entered the SUS during the 1980-80 academic year in higher numbers for the first time in four years: from 13,744 students to 13,914, or 1.2 percent. See Table 76. At the end of the first year, 99.8

RETENTION,ATTRITION AND GRADUATION RATE OF COMMUNITY COLLEGE STUDENTS ENTERING THE STATE UNIVERSITY SYSTEM DURING ACEDEMIC YEAR 1976-77
FLORIDA-RESIDENT-CLASSIFIED STUDENTS

TABLE 72

RACE	TOTAL NUMBER ENTERING S U S	END OF 1 ST YEAR			END OF 2 ND YEAR			END OF 3 RD YEAR		
		RETENTION ENROLLED	ATTRITION	GRADUATED	RETENTION ENROLLED	ATTRITION	GRADUATED	RETENTION ENROLLED	ATTRITION	GRADUATED
WHITE	13,418	13,333 (99.4)	0	85 (.63)	8,293 (61.8)	2,627 (19.7)	2,498 (18.6)	3,487 (26)	4,045 (30.1)	5,886 (43.9)
BLACK	1,242	1,238 (99.7)	0	4 (.32)	830 (66.8)	264 (21.3)	148 (11.9)	418 (33.7)	422 (33.9)	402 (32.4)
HISPANIC	1,058	1,058 (100)	0	0	756 (71.5)	205 (19.3)	97 (9.2)	398 (37.6)	325 (30.)	335 (31.7)
OTHER	407	399 (98.03)	0	8 (1.96)	240 (59.)	87 (21.3)	80 (19.7)	106 (26)	128 (31.4)	173 (42.5)
TOTAL	16,125	16,028 (99.4)	0	97 (.61)	10,119 (62.8)	3,183 (19.7)	2,823 (17.5)	4,409 (27.3)	4,920 (30.5)	6,796 (42.1)

RACE	TOTAL NUMBER ENTERING S U S	END OF 4 TH YEAR			END OF 5 TH YEAR			END OF 6 TH YEAR		
		RETENTION ENROLLED	ATTRITION	GRADUATED	RETENTION ENROLLED	ATTRITION	GRADUATED	RETENTION ENROLLED	ATTRITION	GRADUATED
WHITE	13,418	1,663 (12.4)	4,637 (34.5)	7,118 (53)	965 (7.2)	4,843 (.36)	7,610 (56.7)	621 (4.6)	4,985 (37.1)	7,812 (58.2)
BLACK	1,242	202 (16.3)	523 (42.1)	517 (41.6)	110 (8.9)	565 (45.4)	567 (45.7)	69 (5.6)	587 (47.2)	586 (47.3)
HISPANIC	1,058	207 (19.5)	410 (38.7)	441 (41.7)	115 (10.9)	451 (42.6)	492 (46.5)	88 (8.3)	455 (43.)	515 (48.7)
OTHER	407	47 (11.5)	151 (37.1)	209 (51.4)	26 (6.4)	163 (40.)	218 (53.6)	23 (5.7)	164 (40.2)	220 (54)
TOTAL	16,125	2,119 (13.1)	5721 (35.4)	8,285 (51.4)	1,216 (7.5)	6,022 (37.3)	8,887 (55.1)	801 (4.9)	6191 (38.3)	9,135 (56.6)

RETENTION, ATTRITION AND GRADUATION RATE OF COMMUNITY COLLEGE STUDENTS ENTERING THE STATE UNIVERSITY SYSTEM DURING ACEDEMIC YEAR 1977-78
FLORIDA-RESIDENT-CLASSIFIED STUDENTS

TABLE 73

RACE	TOTAL NUMBER ENTERING S.U.S.	END OF 1 ST YEAR			END OF 2 ND YEAR			END OF 3 RD YEAR		
		RETENTION ENROLLED	ATTRITION	GRADUATED	RETENTION ENROLLED	ATTRITION	GRADUATED	RETENTION ENROLLED	ATTRITION	GRADUATED
WHITE	13,086	13,057 (99.8)	0	29	8,161 (62.4)	2,800 (21.3)	2,125 (16.2)	3,588 (27.4)	4,029 (30.7)	5,469 (41.8)
BLACK	1,234	1,233 (99.9)	0	1	808 (65.5)	273 (22.1)	153 (12.4)	406 (32.9)	424 (34)	404 (32.7)
HISPANIC	1,114	1,114	0	0	779 (69.9)	210 (18.8)	125 (11.2)	385 (34.6)	322 (28.9)	407 (36.5)
OTHER	369	365 (98.9)	0	4	240 (65)	81 (21.9)	48 (13)	115 (31.2)	126 (34.1)	128 (34.7)
TOTAL	15,803	15,769 (99.8)	0	34	9,988 (63.2)	3,364 (21.2)	2,451 (15.5)	4,494 (28.4)	4,901 (31)	6,408 (40.5)
RACE	TOTAL NUMBER ENTERING S.U.S.	END OF 4 TH YEAR			END OF 5 TH YEAR			END OF 6 TH YEAR		
		RETENTION ENROLLED	ATTRITION	GRADUATED	RETENTION ENROLLED	ATTRITION	GRADUATED	RETENTION ENROLLED	ATTRITION	GRADUATED
WHITE	13,086	1,714 (13.1)	4,585 (35)	6,787 (51.9)	1,013 (7.7)	4,812 (36.7)	7,259 (55.5)	679 (5.2)	4,862 (37.1)	7,544 (57.7)
BLACK	1,234	206 (16.7)	537 (43.5)	491 (39.8)	116 (9.4)	580 (47)	538 (43.6)	77 (6.2)	600 (48.6)	557 (45.1)
HISPANIC	1,114	218 (19.6)	395 (35.4)	501 (45)	130 (11.7)	438 (39.3)	546 (49)	93 (8.3)	446 (39.9)	576 (51.7)
OTHER	369	57 (15.4)	139 (37.6)	173 (46.9)	30 (8.1)	156 (42.2)	183 (49.6)	21 (5.7)	158 (42.8)	190 (51.5)
TOTAL	15,803	2,195 (13.9)	5,656 (35.7)	7,952 (50.3)	1,289 (8.2)	5,986 (37.8)	8,526 (54)	870 (5.5)	6,066 (38.3)	8,867 (56.1)

percent were still enrolled and 0.21 percent had graduated. By the end of the second year, 68.9 percent were still enrolled; 11 percent graduated; and 20.1 percent dropped out (attrition). This attrition rate increased 37.5 percent by the end of the sixth year.

Hispanic community college transfer students had the lowest attrition rate after six years, 29.9 percent, and became the largest minority community college transfer student group in the SUS. Hispanics continued to persist longer and had a larger percentage of students still enrolled at the end of each year. Of the 550 Hispanics who graduated at the end of six years, 58.9 percent did so in three years.

White community college transfer students had the largest graduation rate (57.4 percent) for the year. However, 65.8 percent graduated by the end of their third year. Other minorities (excluding Hispanics), seem to keep the graduation, attrition, and retention pace with the white community college transfer students.

Black community college transfer students had the highest attrition rate (49.5 percent) after six years. Blacks were surpassed by Hispanics as the larger minority group transferring to the SUS.

COMMUNITY COLLEGE TRANSFER STUDENTS ENTERING THE SUS IN 1981-82

Community college transfer students (Florida-resident classified students) entering the SUS in 1981-82, declined in number from 13,914 students in 1980-81 to 13,392, or 3.7 percent, in 1981-82. See Table 77. Enrollment for white community college transfer students declined by 3.7 percent; Blacks, 11.5 percent; and Hispanics, 1.5 percent. Enrollment increased for other minorities by 10 percent in 1981-82.

At the end of the first year, 99.7 percent of the community college transfer students were still enrolled, and

0.02 percent had graduated. By the end of the second year, 70.6 percent were still enrolled, 10.5 percent had graduated and 18.8 percent had dropped out (attrition) for various reasons. This attrition rate increased to a high of 35.9 percent at the end of five years.

White community college transfer student attrition increased from 18.8 percent at the end of the second year, to 35 percent at the end of five years. For the first time, white community college transfer students did not have the lowest attrition rate or the highest graduation rate among transfer students entering the SUS. Other minorities (American Indians, Asians, etc.) had the lowest attrition rate, 31.8 percent, and the highest graduation rate, 59 percent. Blacks continued to have the highest attrition rate, 47.7 percent, at the end of five years, and the lowest graduation rate, 41.2 percent, at the end of five years. Hispanics seem to persist longer and had a higher percentage of students still enrolled at the end of each of the five years.

At the end of the five years 7,186, or 53.6 percent, of the 13,396 community college transfer students entering the SUS in 1981-82 had graduated, with 66.2 percent graduating by the end of the third year. White community college transfer students had the highest graduation rate at the end of three years, 67.6 percent, followed by Blacks, 59.2 percent; Hispanics, 58.5 percent; and other minorities, 56.3 percent.

COMMUNITY COLLEGE TRANSFER STUDENTS ENTERING THE SUS IN 1982-83

Community college transfer student (Florida-resident classified students) enrollment increased by 8.5 percent, or 1,244 students, in the 1982-83 academic year over 1981-82. See Table 78. Hispanic community college

transfer students accounted for 44.2 percent or 550 students of this increased enrollment. At the end of the first year, 99.9 percent of the community college transfer students were still enrolled and .06 percent had graduated. By the end of the second year, 72.9 percent of the community college transfer students were still enrolled, 9.6 percent had graduated and 17.5 percent had dropped out (attrition). The attrition rate increased from a low of 17.5 percent at the end of the second year, to a high of 33 percent at the end of the fourth year. Data for community college transfer students entering the SUS in 1982-83 was available for only four years.

White community college transfer enrollment increased by 4.5 percent in 1982-83 over the previous year. At the end of four years, white students had the lowest attrition rate, 32.5 percent, followed by Hispanics, 32.6 percent; other minorities, 33.7 percent; and Blacks 40.9 percent.

Hispanic community college transfer students continued to persist longer with a larger percentage still enrolled at the end of each year. By the end of the third year, 50.7 percent of the Hispanics were still enrolled, followed by Blacks, 43.2 percent; other minorities, 39.9 percent; and Whites, 36.7 percent. At the end of the fourth year, Hispanics had 30.1 percent still enrolled, Blacks 22.3 percent, other minorities, 20.2 percent; and Whites 18.2 percent. The Hispanic enrollment increased by 34.2 percent or 550 students in 1982-83 over the 1981-82 enrollment.

Black community college transfer student enrollment increased only 0.5 percent in 1982-83 over the previous year. Blacks, after four years, had the lowest graduation rate, 36.8 percent, and by the highest attrition rate, 40.9 percent.

COMMUNITY COLLEGE TRANSFER STUDENTS ENTERING THE SUS IN 1983-84

Community college transfer student enrollment declined from 14,640 students in 1982-83 to 14,473 (1.2 percent) in 1983-84. See Table 79. White community college transfer student enrollment declined by four percent; Blacks, by 2.6 percent; Hispanics, 0.81 percent; and other minorities, 17.2 percent.

At the end of the first year, 99.9 percent of the community college transfer students who entered the SUS in 1983-84 were still enrolled and 0.04 percent had graduated. By the end of the second year, 72 percent were still enrolled, 8.9 percent had graduated, and 19.1 percent had dropped out. The attrition rate increased to 28.6 percent at the end of the third year.

Hispanic community college transfer students had the lowest attrition rate for two of the three years 16.3 percent and 26.3 percent). Other minorities (17.8 percent and 27.2 percent); Whites (19.3 percent and 28.3 percent); and Blacks (22.9 percent and 37.7 percent). Hispanics persisted longer and had a higher percentage of students still enrolled at the end of the second and third years.

White community college transfer students had the highest graduation rate, 35.5 percent. Blacks had the highest attrition rate, 37.7 percent, and the lowest graduation rate, 22.8 percent.

COMMUNITY COLLEGE TRANSFER STUDENTS ENTERING THE SUS IN 1984-85

Enrollment of community college transfer students (Florida resident classified students) to the SUS declined 6 percent from 14,466 in 1983-84 to 13,686 in 1984-85 (see Table 80). White community college trans-

fer student enrollment declined by 4 percent, followed by Blacks, 6 percent; hispanics, 5 percent; and other minorities, 37 percent.

By the end of the first year, 99.9 percent of the community college transfer students were still enrolled and 0.05 percent had graduated. At the end of the second year, 71.6 percent of the community college transfer students were still enrolled, 9.4 percent had graduated, and 19 percent had dropped out (attrition). At the end of the second year, 71 percent of the whites were still enrolled; Blacks, 67.9 percent; Hispanics, 76.7 percent; and other minorities 73.2 percent.

The attrition rate was 19 percent for all groups at the end of the second year; whites, 18.5 percent; blacks 27.6 percent; Hispanics, 18.2 percent; and other minorities, 18.3 percent.

White community college transfer students had the highest graduation rate and Blacks the lowest graduation rate and highest attrition rate.

RETENTION,ATTRITION AND GRADUATION RATE OF COMMUNITY COLLEGE STUDENTS ENTERING THE STATE UNIVERSITY SYSTEM DURING ACEDEMIC YEAR 1978-79

FLORIDA-RESIDENT-CLASSIFIED STUDENTS

TABLE 74

RACE	TOTAL NUMBER ENTERING S.U.S.	END OF 1 ST YEAR			END OF 2 ND YEAR			END OF 3 RD YEAR		
		RETENTION ENROLLED	ATTRITION	GRADUATED	RETENTION ENROLLED	ATTRITION	GRADUATED	RETENTION ENROLLED	ATTRITION	GRADUATED
WHITE	11,763	11,721 (99.6)	0	42 (.35)	7,433 (63.2)	2,473 (21)	1,857 (15.8)	3,271 (27.8)	3,548 (30.2)	4,944 (42)
BLACK	1,056	1,054 (99.8)	0	2 (.18)	697 (65)	232 (21.9)	127 (12.02)	327 (31)	364 (34.4)	365 (34.6)
HISPANIC	950	950	0	0	649 (68.3)	192 (20.2)	109 (11.5)	337 (35.5)	286 (30.1)	327 (34.4)
OTHER	414	411 (99.3)	0	3 (.72)	273 (65.9)	95 (22.9)	46 (11.1)	133 (32.1)	137 (33)	144 (34.8)
TOTAL	14,183	14,136 (99.7)	0	47 (.33)	9,052 (63.8)	2,992 (21)	2,139 (15.1)	4,068 (28.7)	4,335 (30.5)	5,780 (40.8)

RACE	TOTAL NUMBER ENTERING S.U.S.	END OF 4 TH YEAR			END OF 5 TH YEAR			END OF 6 TH YEAR		
		RETENTION ENROLLED	ATTRITION	GRADUATED	RETENTION ENROLLED	ATTRITION	GRADUATED	RETENTION ENROLLED	ATTRITION	GRADUATED
WHITE	11,763	1,587 (13.5)	4,111 (34.9)	6,065 (51.6)	949 (8.06)	4272 (36.3)	6,542 (55.6)	672 (5.7)	4,326 (36.8)	6,764 (57.5)
BLACK	1,056	157 (14.9)	446 (42.2)	453 (43)	98 (9.3)	468 (44.3)	490 (46.4)*	78 (7.4)	474 (44.9)	504 (47.7)
HISPANIC	950	190 (20)	341 (35.9)	419 (44.1)	112 (11.8)	379 (39.9)	459 (48.3)	65 (6.8)	396 (41.7)	489 (51.5)
OTHER	414	57 (13.8)	160 (38.6)	197 (47.6)	46 (11.1)	158 (38.2)	210 (50.7)	26 (6.3)	166 (40.1)	222 (53.6)
TOTAL	14,183	1,991 (14.03)	5,058 (35.7)	7,134 (50.3)	1,205 (8.5)	5,277 (37.2)	7,701 (54.3)	841 (5.9)	5,362 (37.8)	7,979 (56.3)

FINDINGS AND RECOMMENDATIONS

The purpose of this study was to present a comprehensive chronology of black student enrollment in public community colleges and public universities. Further, it was to present a comparison of the graduation rates of various ethnic groups which transferred from community colleges to public universities. To conceptualize the study, empirical data were obtained from the following primary sources in Florida; the Board of Regents, the State Board of Community Colleges and the Postsecondary Education Planning Commission. Data also were obtained from the following secondary sources community colleges, Southern Region Education Board and a variety of printed materials.

The importance of the foregoing purpose is to present a comprehensive representation of the enrollment and graduation trends of community college black students. It is also important to show the transfer, retention, and graduation trend of black students with associate in art degrees who enter public universities.

The period under consideration was a 9-year period covering the fall terms and academic years 1976-77 through 1984-85. This period is pivotal in Florida's history because of the number of educational reform policies implemented during the period under consideration.

FINDINGS

The analysis of the data revealed the following:

- Black student enrollment declined from the 1976 fall term in 21 of the 28 community colleges.
- Black students graduated from community colleges at a rate lower than their counterparts.
- The number of students transferring from community colleges into public universities declined from 1976 through 1985.

- Public universities retained other transfer students in greater number than they retained black students.
- One-half or fewer of the black transferees from the community colleges were graduated.
- The largest decline in the number of community college graduates occurred between the academic years 1983-84 and 1984-85.
- Hispanic students surpassed black students as the largest minority group of community college transferees in public universities from academic years 1980-81 through 1984-85.
- The group with the lowest graduation rate from public universities six years after transferring from community colleges was black students.
- The enrollment of black students declined over the nine year observation period at a much higher rate than that of minority students generally.

Recommendations

The analysis of data and review of the related literature suggest these recommendations:

1. Community colleges should examine their overall recruitment procedures.
2. Community colleges should determine the effectiveness of their recruitment procedures for attracting black students.
3. Community colleges should identify the causative factors in the high rate of attrition among black students.
4. Community colleges should examine critically their methods of preparing black students to master graduation requirements.

5. Community colleges should examine the reasons for the decline in the number of black students with associate in arts degrees transferring into the state university system.
6. Public universities should examine their procedures for recruiting black students with associate in arts degrees.
7. Public universities should examine the causes of the high attrition among black transferees.
8. Public universities should examine their methods of preparing black community college transferees for graduation.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3095-70

KENNETH ADAMS, *et al.*,
Plaintiffs

v.

F. DAVID MATHEWS,
Individually, and as Secretary of the Department of Health, Education and Welfare, *et al.*,
Defendants

EXCERPTS FROM AMICUS CURIAE BRIEF FILED BY NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION

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* * * *

II

THE FURTHER RELIEF REQUEST SHOULD BE DENIED

What emerges from the grounds of this suit, as well as the relief requested, is that as to Higher Education, the maintenance of the Black Colleges and the larger University within a particular state is the maintenance of a dual system of education based upon race; therefore, the state is discriminating and engaging in conduct forbidden by the Fourteenth Amendment. It follows then, that the states must establish a unitary system—one system. To accomplish this, the Plaintiffs advocate that the Black institutions must be assimilated into the white unitary system where there is presumptively equal edu-

cational opportunity. To allow this assimilation would be independent of, and contrary to, the State's objective to maintaian "special purpose" institutions of Higher Education.

The opportunity of an education means nothing if it does not mean the "equality of educational attainment." It is the position of the Black educators joining in this Amicus Brief that equal educational opportunity is not the goal, but that "equality of educational attainment" is the goal and the command of the Federal Constitution, and the intendment of the Civil War Amendments.

The Supreme Court in Brown, supra, at 493, stated:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of and education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

The Black institutions of Higher Education have served and continue to serve as the bridge between a crippling and debilitating elementary and secondary educational system, to which *Brown*, itself was directed because of the experience with the equal education cases from *Murray to Sweatt* in the field of higher education. This experience demonstrated that equality of educational attain-

ment could not be achieved until the feeder system of the secondary and elementary levels has been improved for Black students. It has been over twenty years since the Court decided *Brown*. At present, the general consensus is that this feeder system has not been improved and maybe has lost ground, (see footnote #5, Mr. Justice Douglas' concurring opinion in *Jones v. Mayer Co.*, 392 U.S. 409, 444-449 (1967). An Order to assimilate Black Institutions of Higher Learning would be analogous to removing a wooden beam to replace it with a steel or cement device, before the new beam is in place, thus leaving the structure entirely unsupported. There must be a transitory period in which remedial type activity must be instituted in order to rectify past inequality. This function must be supported by the respective states and the Federal government, for each share the Fourteenth Amendment duty to remove the "badges, incidents and vestiges" of slavery. Remedial type activity cannot cease until Black people have in fact equal educational opportunity and not mere theoretical illusory opportunity.

Whether the compensatory schemes presently invoked in a number of "white institutions" will meet constitutional attacks is highly doubtful. Whether energy and determination to pursue this activity will continue is likewise doubtful.

To opt for the one higher educational illusion and have the compensatory activity abandoned or proved ineffective because of the lack of expertise and understanding to achieve success, with the Black Institutions assimilated out of existence, would be tragic to the survival of Black people in a technological world.

Any activity by the Federal or state government to undermine the supportive role which these institutions presently perform is of itself discriminatory and contrary to the intendment of the Civil War Amendments. To remove the compensatory bridge which Blacks now have to

any hope of equality of educational attainment is violative of the constitutional guarantees.

The basis of the Plaintiffs' argument is that the state plans ad the individual schools are not reflective of HEW letters of criteria for compliance with the opinion of the Court of Appeals on desegregation in higher education. Of the various goals presented, as Plaintiffs cite in their Motion at page 17, was that directing the states to commit themselves to a 30% white enrollment at Black Institutions and substantial increases in Black enrollment at white institutions.

To support Higher Education blindly without recognition of the socio-economic disabilities imposed by society is in fact discrimination. Desegregating Black Institutions cannot be achieved by purely "racial imbalance" using the "salt and pepper" statistical approach. The issue is more complex. As the late President Lyndon B. Johnson emphasized at the Civil Rights Symposium at the dedication of the Lyndon Baines Johnson Library, in Austin, Texas, December, 1972:

> "(We) cannot obscure this blunt fact, the black problem remains what it has always been, the simple problem of being black in a white society. That is the problem to which our efforts have not yet been addressed. To be black in a white society is not to stand on level and equal ground. While the races may stand side by side, whites stand on history's mountain and blacks stand in history's hollow. Until we overcome unequal history, we cannot overcome unequal opportunity."

The gravamen of the Plaintiffs' motion is to force HEW to terminate its financial contributions to the states under Title VI. The intent of Title VI's termination power was discussed at length in Congressional debate, which states in part:

> "(T)he intent of Title VI is not to require a wholesale cut off of Federal funds from all programs in entire States, but instead to require a careful case-by-case application of the principle of nondiscrimination to those particular activities which are actually discriminatory or segregated." 4110 Cong. Rec. 7103 (1964)[4]

In considering the intent of HEW's authority to terminate funds supplied by virtue of Title VI, the Fifth Circuit in *Board of Public Instruction of Taylor Florida va. Finch*, 414 F. 2d 1068, 1076 (1968) stated:

> "The termination of Federal funds affects the lives of persons not represented in the administrative proceedings below. For their protection, we may not regard the limitations on the termination power as mere procedural niceties peripheral to the purpose of the Act."

The Court went further to say "we may not regard the limitations on the termination power as mere procedural niceties . . . . Congressional history indicates that limiting the scope of the termination power was integral to the legislative scheme . . ."

The aforementioned passages demonstrates two equally important points: (1) the "innocent beneficiaries" of Title VI funds must be protected; (2) the termination power of the agency is limited to and requires specific findings of fact as to the program by program violation.

This interpretation is supported in an Order of the Fourth Circuit in Mandel v. HEW, Civil Action No. 7-76-1, March 8, 1976 at 38-39, which states *inter alia*:

> "To compel all of these programs, regardless of whether or not each is discriminatory, to prepare a defense and endure protracted enforcement proceedings is wasteful, counterproductive, and probably inimical to the interests of the very persons Title VI

> was enacted to protect. It is far more equitable, and more consistent with Congressional intent, to require program delineation prior to enforcement hearings than to include all programs in enforcement proceedings. As the Fifth Circuit observed in *Board of Public Instruction v. Finch, supra*, 'a program should not suffer for the sins of others.' 414 F. 2d at 1079. Consequently, this Court concludes that, in the interest of justice, Title VI demands a program-by-program breakdown prior to enforcement proceedings (during voluntary compliance efforts). Since defendants have conducted no such examination, defendants have not complied with mandates of Section 2000d-1."

In short, to date the purpose of *Brown* has not been accomplished. But, more importantly, Black Institutions have a unique history and pristine background of not contribution to the programs to which the Civil War Amendments are directed, but rather ameliorating them. The educational progress or lack of advancement by Black people has been conditioned by the institution of slavery and other disparaging badges which have and today condition our metaphysics.

In assessing the past and future role of the predominantly Black Colleges and Universities the words of Mr. Justice Douglas, concurring in *Jones v. Mayer Co., supra* 445-446, are sobering to say the least:

> Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to the Court depict a spectacle of slavery unwilling to die. We have seen contrivances by States designed to thwart Negro voting, e.g., *Lane v. Wilson*, 308 U.S. 268. Negroes have been excluded over and again from juries solely on account of their race, e.g., *Strauder v. West Virginia*, 100 U.S. 303,

or have been forced to sit in segregated seats in courtrooms, *Johnson v. Virginia* 373 U.S. 61. They have been made to attend segregated and inferior schools, e.g., *Brown v. Board of Education*, 347 U.S. 483, or been denied entrance to colleges or graduate schools because of their color, e.g., *Pennsylvania v. Board of Trusts*, 353 U.S. 230; *Sweatt v. Painter*, 339 U.S. 629. Negroes have been prosecuted for marrying whites, e.g., *Loving v. Virginia*, 388 U.S. 1. They have been forced to live in segregated residential districts, *Buchanan v. Warley*, 245 U.S. 60, and residents of white neighborhoods have denied them entrance, e.g., *Shelley v. Kraemer*, 334 U.S. 1. Negroes have been forced to use segregated facilities in going about their daily lives, having been excluded from railway coaches, *Plessy v. Ferguson*, 163 U.S. 537; public parks, *New Orleans Park Improvement Assn. v. Detiege*, 358 U.S. 54; restaurants, *Lombard v. Louisiana*, 373 U.S. 267; public beaches, *Mayor of Baltimore v. Dawson*, 350 U.S. 877; municipal golf courses, *Holmes v. City of Atlanta*, 350 U.S. 879; amusement parks, *Griffin v. Maryland*, 378 U.S. 130; buses, *Gayle v. Browder*, 352 U.S. 903; public libraries, *Brown v. Louisiana*, 383 U.S. 131. A state court judge in Alabama convicted a Negro woman of contempt of court because she refused to answer him when he addressed her as "Mary," although she had made the simple request to be called "Miss Hamilton." *Hamilton v. Alabama*, 376 U.S. 650.

That brief sampling of discriminatory practices, many of which continue today, stands almost as an annotation to what Frederick Douglass (1817-1985) wrote nearly a century earlier:

> "Of all the races and varieties of men which have suffered from this feeling, the colored people of this country have endured most. They can resort to no disguise which will enable them to escape its deadly

aim. They carry in front the evidence which marks them for persecution. They stand at the extreme point of difference from the Caucasian race, and their African origin can be instantly recognized, though they may be several removes from the typical African race. They may remonstrate like Shylock—'Hath not a Jew eyes? hath not a Jew hands, organs, dimensions, senses, affections, passions? fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same summer and winter, as a Christian is?'—but such eloquency is unavailing. They are Negroes—and that is enough, in the eye of this unreasoning prejudice, to justify indignity and violence. In nearly every department of American life they are confronted by this insidious influence. It fills the air. It meets them at the church, at the hotel, at the ballot box,and worst of all, it meets them in the jury-box. Without crime or offense against the law or gospel, the colored man is the Jean Valjean of American society. He has escaped from the galleys, and hence all presumptions are against him. The workshop denies him work, and the inn denies him shelter; the ballot box a fair vote, and the jury-box a fair trial. He has ceased to be the slave of an individual, but has in some sense become the slave of society. He may not now be bought and sold like a beast in the market, but he is the trammeled victim of a prejudice, well-calculated to repress his manly ambition, paralyze his energies, and make him a dejected and spiritless man, if not a sullen enemy to society, fit to prey upon life and property and to make trouble generally."

Today the black is protected by a host of civil rights laws. But forces of discrimination are still strong.

The doors of Black Institutions without exception have, from the very beginning of their existence been open to

all races, sex, colors, creeds, and they have always collectively offered employment and other incidental privileges to all who passed through their doors, except where state law prohibited the same. They have been menders, healers for wounded minds and restless souls. They have produced sterling talent which has benefited this Republic beyond measure of calculation—not only in material contributions, but intellectual, cultural, moral and spiritual offerings. In a number of instances, Black Institutions have been more profoundly representative of the American Ethic than the larger, more affluent, schools of Higher Education in this country. Indeed, they have been and remain today a domestic "Marshall Plan" committed to a public offering of education attainment "in free simple absolute," rather than "an illusory expectancy" of educational opportunity.

The Black Institutions of Higher Education have welcomed, nurtured and developed the progeny of the slave system. As two distinguished scholars have recently observed:

> None of the institutions of the larger society work as well for Black people as they do for white people. They were not designed to do so. This is true of all the major institutions without exception. Of course, there is some variation; some institutions function worse for Black people than do others. But whether we think of education, health services, the communications media, religion, law enforcement, or any other dominant system of the larger society we see white racism at work. It is this force more than any other which makes Black children, Black families, and Black communities specially vulnerable to the vicissitudes of life; and it is the major cause of the widespread and continuing poverty within the Black community. *The combination of racism and poverty caused and maintained by the institutions of the larger society is, we contend, primarily responsible*

> *for the stormy past, present, and future of Black children in need.* (Dr. Andrew Billingsley, Jeanne M. Giovannoni, *Children of the Storm*, Harcourt-Brace-Jovanovich, Inc., 1972) (Emphasis added)

Finally, the institutions whose views are presented in this Amicus Brief, with backgrounds of perpetual service to all people, with missions and goals to make educational opportunities a reality rather than an empty expectation, it is impertinent to charge them with violating the law with the promotion of racism. It is an affront to categorize them in the same class as other institutions with ignominous histories of selective exclusion of Blacks, and other minorities, where these institutions have labored so long in the vineyards alone desparately seeking to overcome the disablements visited upon the principal victims of a racist society.

CONCLUSION

For the reasons stated, this Court should deny the Plaintiffs' Motion for Further Relief.

Respectfully submitted,

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STATEMENT BY THE NATIONAL ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION

GUIDELINES FOR THE REVISION AND STRENGTHENING OF STATE PLANS FOR HIGHER EDUCATION

The National Association for Equal Opportunity in Higher Education respectfully requests that you consider the following recommendations in preparing your orders to the Department of Health, Education, and Welfare regarding guidelines for the revision and strengthening of state plans for higher education in the continuing case of *Adams* v. *Richardson.*

1. The purpose of the state plans should be explicitly stated as increasing numbers of Black Americans educated at all levels of higher education (undergraduate, graduate and professional) and in all major fields of study in order to bring about equality and equity in American higher education.

2. The cornerstone of the state plans should be a series of concrete, systematic and long-range measures to protect, enhance and expand the historically and predominantly Black colleges and universities. In the *Adams* states these institutions continue to produce the overwhelming majority of college-educated Blacks. In the nation as a whole, they produce more than half of all Blacks earning bachelor's degrees. They have enormous potential for graduate and professional study; moreover, they serve a major function for the preservation and study of the Afro-American heritage. They also make an important contribution to inter-racial cooperation.

3. The state plans should facilitate an increase in the numbers of Black students graduating from the predominantly white institutions at all levels with undergraduate, graduate, and professional degrees.

4. The state plans should increase the level of racial integration at the predominantly white institutions. This includes the governing boards, administrative staffs, as well as their student bodies. Moreover, these institutions should be required to establish effective affirmative action programs designed to give special attention to the special needs of Black students and special training programs where necessary for staff and faculty development.

5. The state plans should be state-wide and system-wide in scope. They should be administered by a broadly representative body with authority to implement the plan. This official body should include Black educators and citizens representing at a minimum their proportion in the state populations. Moreover, the portion of the plan dealing expressly with Black higher education should be reviewed and approved by an advisory body, the majority of whose members are Black, with strong representation from the historically Black colleges and universities.

Please allow us to expand briefly on these five recommendations.

Increasing the Number of Educated Blacks

We have recommended that the explicit purpose of state plans should be to increase the number of Blacks educated at all levels and in all major fields. Our experience and observation is that this goal is often lost sight of in a number of state plans and in the positions sometimes taken by the Department of Health, Education, and Welfare, and plaintiffs in this case as well. In our experience and in our view, increasing substantially the numbers of educated Blacks at all levels and in all fields is the principal means by which meaningful integration may be brought about not only in higher education but in the professions and in American life generally.

This requires eliminating the disparity between Blacks and whites in undergraduate, graduate and professional

school enrollment and in graduation from these levels of higher education. It also requires the elimination of employment and salary disparities at all levels of the higher education system including the staffs of the governing boards. Equitable representation is also required on all governing boards of the system.

In setting criteria for a reasonable and equitable plan, certain background principles must be set forth which govern the plan. The principles from the perspective of the National Association for Equal Opportunity in Higher Education are derived from the following paragraph taken from the Opinion of the United States Court of Appeals of the District of Columbia in its ruling on the original order issued by you on June 21, 1973 which reads:

> "The problem of integrating higher education must be dealt with on a statewide rather than a school-by-school basis. Perhaps the most serious problem in this area is the lack of state-wide planning to provide more and better-trained minority group doctors, lawyers, engineers and other professionals. A predicate for minority access to quality post-graduate programs is a viable, coordinated state-wide higher education policy that takes into account the special problems of minority students and black colleges. As amicus points out, these black institutions currently fulfill a crucial need and will continue to play an important role in black higher education."

An analysis of the paragraph makes clear that there must be state-wide policies designed to provide:

1. "more and better trained Black professionals" which depends on access to schools and graduation followed by entry to and graduation from graduate and professional schools.

2. "*solutions to the special problems of Black students*" in gaining access to undergraduate, graduate, and profes-

sional schools and to completing their work. Most of these problems derive from the historic and contemporary unequal and inadequate elementary and secondary school education and job discrimination which depresses Black income levels and their ability to afford higher education.

3. "*an important role for historically Black colleges because they fulfill a crucial need.*" The colleges in most *Adams* states provide a majority of the Black baccalaureate degree earners each year. More and better Black professionals can only be generated by state-wide planning which builds on the existing ability of these institutions to produce the Black graduates who become professionals.

4. "*for the special needs of Black colleges,*" these special needs are based on historic inequities in funding and in the contemporary fact that they have responsibility for educating large numbers of Black students victimized by earlier inadequate education.

The policies must move toward the goal of equity between Blacks and white in:

1. Access and enrollment in the variety of types of institutions—2 year, 4 year, universities, graduate and professional schools;

2. Increased *retention* rates in moving through to completion of colleges;

3. Expanded *graduation* and enrollment rates after reasonable periods of enrollment;

4. *Access* to graduate and professional schools after graduation from college; and

5. Graduation from graduate and professional schools.

The State-wide Plan must focus on outcomes as stated in the five points above, with a recognition that to catch

up requires setting goals in advance of any population ratios.

NAFEO is concerned that the plans focus on the *educational* needs of Blacks, rather than on mechanical, numerical schemes which do not take into account the end results to be accomplished. The numbers that are of primary concern to NAFEO come at the end of the process in Black graduates of the colleges of a state. As a matter of policy it must be recognized that the historically Black colleges are and historically have been the primary producers of educated Blacks or *graduates* of colleges in the states. Their current roles and functions cannot be damaged or disrupted by mechanical schemes that deny the reality that they contribute more to the goal of an integrated society than any other institutions in these states and in the nation.

A recent study showed the 80% of the Black graduates in the South in 1973-74 were produced by historically Black colleges. Of the 26,000 Black graduates, 21,000 come from the historically Black colleges. Whatever integration that occurs in these states in the professions depends heavily on these graduates. Historically Black colleges, public and private, produce more than half of the 50,000 black baccalaureates produced nationally each year.

The strengthening of the historically Black colleges must be a major priority of the State-wide Plans to produce more and better higher education for Blacks.

Conversely, more pressures for increased proportions of Black students and faculty must be placed on the historically white institutions since they are most delinquent in producing education for Blacks. They cannot, however, be allowed to consciously plan to do that at the expense of already effective educational programs in the historically Black colleges.

Enhancing and Strengthening Historically Black Colleges and Universities

We have recommended that the corner-stone of state plans should be to protect, enhance, and expand the historically Black colleges and universities as the most effective way of expanding the pool of educated Blacks.

All the state plans should have an explicit commitment to special efforts for the education of Black Americans. It would be a mistake to assume that Black Americans have reached equality with white Americans and that the same approaches would be equally beneficial to members of both groups. Some of the features of the existing state plans and some views emanating from both plaintiffs and defendants in this case tend to obscure the harsh reality of existing racial inequities.

It is also important to recognize that this state of inequity and the state of disadvantaged experience by Black Americans generally did not evolve of its own accord or out of the voluntary actions of the private citizens alone. The history of this nation is replete with reminders that state action at the federal, state, and local levels has been intimately involved in maintaining this inequity. In recent years the publication of Alex Haley's *Roots* and the national television production of excerpts from this book graphically illustrated the concern of Americans generally for this unequal aspect of our history. Former President Lyndon Johnson expressed it as follows: "To be black in a white society is not to stand on level and equal ground. While the races may stand side by side, whites stand on history's mountains while blacks stand in history's hollows. Until we overcome unequal history, we cannot overcome unequal opportunity."

Professor Herbert O. Reid, Charles Hamilton Houston Distinguished Professor of Law at Howard University, has observed "America's moral dilemma has raised the stark constitutional issue of whether racial classifications

may be used for 'benign purposes.' Stated another way—may the state single out racial minorities for favorable treatment, for remedial, compensatory, or similar purposes. There has clearly emerged one area where government need not be color blind, indeed must be color conscious." (Annual Martin Luther King Day Convocation, University of California, Davis School of Law, February 4, 1977).

In short, because of the essence of inequity and because the state has been so heavily implicated in this inequity, special efforts are required by the state to ensure that compensatory measures are taken to move more rapidly toward equality. A major form of special effort is represented in the special-purpose institutions whose primary mission is the education of Black Americans. Another special effort is represented by affirmative action programs within the predominantly white institutions. Both forms of special effort must pay particular attention to the needs of Black Americans and should not seek to avoid the harsh realities of racial inequality.

Again, Professor Herbert O. Reid has spoken to this matter: "It is this writer's view that in order to achieve effective and positive results under the mandate of affirmative action, racial clasisfications and preferential treatment are necessary. Race must be taken into account in order to effectuate the goal of an integrated society."

"The theory supporting the concept of affirmative action is the benign treatment of minorities after generations of exclusion from the mainstream of American society. The concept itself demands more than mere state neutrality. What is demanded is positive action to either promote opportunities to qualified members of minority groups or to enable members of such groups to become qualified. No less is sufficient in order to overcome the residue of systemic institutional discrimination."

A similar view has been expressed by Professor Theodore J. St. Antoine, Dean of the University of Michigan Law School.

In supporting affirmative action in employment, Professor St. Antoine reminds us that the Constitution nowhere requires a color-blind approach, but "equal protection of the Laws" for all American citizens. Moreover, "the mandate of equal treatment . . . presupposes equal status of circumstances." Accordingly, it may be both necessary and constitutional to require "specified numerical goals in hiring minority group members and women, depending upon a comparative assessment of the current status of minorities, women and white males." (New York Times, "Affirmative Action, A 'Heroic' Measure," November 26, 1976).

Preferential treatment is a necessary means of providing for equality of opportunity and attainment in higher education. In this connection, then, the primary purpose of strengthening the Black colleges should be to enable them to do a better job of their primary mission of educating more Blacks. At the same time, it should be recognized that these institutions provide a variety of other very valuable functions not only for the Black community but for the society in general.

A second and most vital function is the preservation and study of the Afro-American cultural heritage.

Still a third function they serve is providing for the Black community social pride, a sense of positive identity and accomplishment and leadership. This is a wholly constructive function in a society which is culturally diverse.

But the functions of these historically Black institutions are not confined to the Black community itself. These institutions have long served and continue to serve as centers of interracial cooperation. As a class of institutions, the historically Black colleges and universities continue to be the most interracial institutions in Amer-

ica. This interracial cooperation is reflected in their student bodies, their faculties and staffs, their governing boards, the programs they conduct, their purchasing, savings and investment policies and practices. Consequently, the state plans should recognize these institutions as already in conformity with Title VI with both the letter and the spirit of Title VI and should place no further burdens on them by requiring arbitrary quotas of white students or staff or by requiring other means of racial balance.

State plans should forbid the dismantling of any of these institutions, or any state action which would have the effect of closing, limiting, or curtailing their operation, so long as they continue to serve their original purpose of focusing primarily on the education of Black Americans while maintaining an open posture to non-Blacks who wish to attend and who can benefit from their programs.

What is required to enhance these institutions are the following five measures at a minimum:

1. Financial support which is not only commensurate with the support provided to the white institutions but which carries also a compensatory feature. Thus, budgetary support for the historically Black institutions at something like 120 per cent of the formula provided to the other institutions is what we have in mind. Moreover, financial support for the institutions must take into account the historic underfunding of them since the time they became public institutions. It costs more to educate students who have been severely handicapped and who come from most socio-economic backgrounds. This should be reflected in the budgets of the institutions.

2. Capital outlays for these institutions should reflect the need for modern buildings, facilities and equipment of the highest quality equal to any in the state.

In many of these institutions considerable expenditures need to be made for upkeep and renovation of existing facilities.

3. New academic programs must be established under auspices of the traditionally Black institutions before expanding such facilities on traditionally white institutions. This includes a full range of undergraduate programs and selected graduate and professional programs, research programs, and community service programs which serve the needs of the Black community and the larger non-Black community as well. This also requires the location of some of the most prestigious professional schools in our society such as Medicine, Dentistry, Forestry, Veterinary Medicine, Pharmacy, Public Administration, Business and Law, in these institutions.

4. Finally, special programs for faculty and staff development must be instituted at these institutions so that existing staff may be helped to expand their interests, skills and abilities. No program of transferring or substituting new faculty should ignore major contributions existing faculty members have already made and are capable of making to the essential mission of these institutions. Moreover, salaries, benefits and other working conditions should be made competitive in these institutions.

5. State plans should give explicit recognition to the fact that these historically Black institutions are the most integrated educational institutions in America. This is true with respect to their governing boards, their staffs and faculties, and now increasingly to their student bodies. No state plans, however, should mandate any specific numbers or quotas of white administrators, faculty or students in these institutions as long as they are in keeping with the law and protective of the rights of all American citizens who wish to apply to them. Some suggestions on the part of both the defense and plaintiff

in this case would have the effect of squeezing our Black faculty and staff from some of these institutions in order to make room for white ones. In our view this is not consistent with the purpose of state plans; it serves no useful purpose and might have most destructive impact on these institutions and on the quality of racial progress in the community generally.

As the National Association for Equal Opportunity in Higher Education stated in its report to Secretary David Mathews of HEW on November 4, 1975, the government has the responsibility to assist these institutions meet what is a national purpose.

The goal for Black Americans is more than just equal opportunity. It is equal opportunity, equal attainment and equal productivity: There must be attainment following opportunity and institutional responsiveness can help this happen. No one is proposing lesser standards for attainment, but a recognition that it will not happen if people are admitted, enrolled and left alone to overcome earlier inequities without help.

There must be productivity following attainment. Blacks must stay in the programs they enrolled in and graduate in the same proportions as whites at all levels and across all fields. The degree taking will set the stage for full participation in the professional, technical and leadership sectors of America.

The historically Black colleges have operated on the basis of the goal of opportunity, attainment and productivity. Their leadership will be critical as others coming new to the task seek ways to provide opportunity without attainment and productivity.

Affirmative Action in Predominantly White Institutions

State plans should require that the predominantly white institutions increase their contribution to the overall production of Black graduates and increase their contribu-

tion to integrated faculties and staffs throughout the system. We have already indicated that special efforts in the form of affirmative action programs for faculty, staff and students are indispensable if these institutions are to meet their responsibilities. State plans must ensure that special efforts within the white institutions must consider problems of admission, enrollment, retention, financial aid, distribution goals, graduate goals, and faculty development.

Admissions Policies

A state-wide policy must be developed that gives equal access of Blacks to all institutions—two-year, four-year universities, and graduate and professional schools. The policy must not use admissions criteria whether tests or otherwise which disproportionately exclude Blacks. Ways have been found to increase Black access at undergraduate and professional schools without damaging so-called standards. We recommend that policy planners look at the efforts of the Council of Legal Opportunity, the special minority programs of the American Association of Medical Schools and the American Association of Law Schools.

States must not develop admissions policies which force historically Black colleges to move toward historically white colleges in admissions policies which will exclude Blacks. It appears particularly counterproductive to force changes in successful access policies. Admissions policies could put the emphasis on previous academic achievement and personal recommendations.

Enrollment Ceiling Policies

Enrollment ceiling policies must be reviewed to ensure they are not locking historic inequities in place. No state should be allowed to set an enrollment ceiling on Black enrollment so long as there are inequities in the proportions of Blacks enrolled in the state-wide system. Enroll-

ment ceilings tell schools that they cannot exceed a certain number of students in a given year or can only increase enrollment by a set percentage and then must turn students away.

Distribution Goals

Blacks shall not be disproportionately enrolled in two-year institutions and in non-collegiate work in vocational technical schools. To achieve the goals of the Appeals Court decision, plans must increase participation and completion in the baccalaureate collegiate sectors of the state system. State-wide policy and plans must impact maldistributions which see disproportionate numbers of Blacks outside the collegiate sector. The plan must have concrete steps for assisting Blacks in the two-year and non-collegiate sector to transfer to four-year institutions. This includes counseling and financial help.

Financial Aid

A state-wide policy on financial aid must recognize the disproportionately higher needs of Black students, especially in the collegiate sector where fees are substantial and residency is often required. Financial aid policies must be set that do not have the effect of forcing, for economic reasons, Black students into the least expensive institutions in the state. A state-wide review of the relationship between state programs of student financial aid and similar federal programs is required. Some state-wide approaches must be taken to securing higher amounts of financial aid for students in order to pursue the goals of equity required by the court order. Special care must be taken to ensure that the state-wide approach does not reduce existing levels of financial aid available in historically Black colleges, but strives to increase the pool in all colleges. Students in Black colleges are especially vulnerable to redirections in aid.

Retention Programs

A state-wide planning function to design and assist in the implementation of such progress should be developed. The best thinking in a state must be pooled and used to benefit all institutions. Experienced and knowledgeable Black educators can be especially influential and should be utilized to design such programs based on their experience in educating large numbers of Blacks and getting them into graduate and professional schools. These programs must focus on staff development work for faculty, counselors, administrators, and not just on differences of Black students. They must indicate how they intend to impact those responsible for helping Black students as well as the Black students themselves. Only if this is part of the planning can these programs be successful. Higher education senior faculty must have it made clear as a matter of state-wide policy that they must share in the responsibility for helping Black students.

Graduation Goals

Steady increases in the numbers and proportions of Blacks achieving baccalaureate degrees. This goal creates premises for programming that maximizes Black achievement and maximizes the ability of Black youth to meet rigorous academic standards. Higher education cannot slough off responsibility for helping make up for what the public schools did not do for racially discriminatory reasons. The final goal is equity in the proportion of whites and Blacks in the 25-34 age group with baccalaureate first professional degrees as well as graduate and professional degrees.

The plan should recognize that a disproportionate amount of the pressure to achieve these goals must fall on the predominantly white institutions. The historically Black institutions are already the corner-stone of enrollment in the baccalaureate, collegiate sector for Blacks.

Faculty Development

The focus in this area must be both on expanding the pool of available Ph.D.'s and in recruiting and hiring. The major goal is to increase the available pool from which to recruit. Some regional approaches may have to be ordered because of the peculiar nature of graduate education that tends to recruit students across state lines rather widely. A good graduate school prides itself on its cosmopolitan enrollees. The collective force of the public graduate schools, then, may be more effective than each state going it alone. There is already a regional compact Southern Regional Education Board that can be ordered to convene meetings and report back to HEW on its efforts. Black educators must be involved in the regional planning. The goal must be to move to a proportion of Black faculty on white campuses comparable to the proportion of Black students in the state-wide system by 1985.

We have recommended that the state-wide planning authority be broadly representative and have significant input from Black educators and Black citizens. In our view it is critical that the very structure for planning in each of the states be assessed by the Department of Health, Education, and Welfare as adequate and in keeping with the essential purpose of the plans. All or predominantly white planning bodies fly in the face of this requirement. Nor is it sufficient to have a small percentage of Blacks on these state-wide bodies. In addition to a representative number of Blacks on the overall state authority, we recommend very strongly that HEW be required to have all these state plans reviewed by an advisory group which is majority Black with some of its members drawn from the historically Black colleges and universities.

It is very important that those most intimately concerned, knowledgeable and committed to the effective

education of Black Americans be involved in an influential way in the very process of revising and strengthening these state plans. This is one way of ensuring that the primary goal of educating large numbers of Blacks may be kept at the center of the planning process. It is also a means of ensuring that these state plans do not inadvertently serve the purpose of dismantling those institutions and programs which have the most promise for educating larger numbers of Blacks.

This statement addresses the major concerns that we have with regards to maximizing and expanding opportunities for Black Americans.

Submitted by The National Association for Equal Opportunity In Higher Education by Miles Mark Fisher, IV., Executive Secretary.

MILES MARK FISHER, IV
Executive Secretary
The National Association for
Equal Opportunity in
Higher Education

HIGHER EDUCATION ADVISORY PANEL
GOVERNOR-ELECT ROEMER TRANSITION TEAM

March 7, 1988

Governor-elect Buddy Roemer
Transition Headquarters
Pleasant Hall, LSU-BR Campus
Baton Rouge, LA 70821

Dear Governor:

This is the report of the Advisory Panel on Higher Education named by you in late 1987.

You requested that we study Louisiana's public higher education situation with particular reference to "governance and structure, coordination with elementary and secondary education and vocational/technical training, and economic development."

Panel members have been diligent in their attendance at meetings concerned with our assignment, dedicated to reaching sound conclusions, and committed to providing you with appropriate recommendations.

Attached to this letter is a list of panel members, and the names of individuals who served as proxies at some meetings.

The work of the panel was made easier and more effective by the contribution of Danny Walker as Secretary, Coordinator of the staff, and Acting Chairman for one meeting. I'm particularly grateful for his effective assistance.

This report consists of our recommendations and a chronology of the panel's meetings and deliberations. Much more detail is available should it be required later. The highlights of the recommendations are: one system-one university; one policy-making Board of Governors; a strong administrative-management structure; a diversity

of institutions with role, scope and mission more sharply focused to eliminate needless duplication; the economic development role of higher education and coordination with all areas of education, public and independent, or private.

With this report we consider our assignment complete. However, the panel and its individual members stand ready to assist you in any way we can be helpful.

Thank you for giving us the opportunity to participate in this unusual undertaking.

Sincerely yours,

/s/ Joe D. Smith, Jr.
JOE D. SMITH, JR.
Chairman

JDSjr/gm

Attachments

Higher Education Advisory Panel

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8. Della Bonnette
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Represented by Richard Cusimano at one meeting

9. Dr. Charles Whitehurst, Director
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10. Dr. Willene Taylor, Professor of English
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14. Emogene Pliner
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15. R. Tom Fetters, President
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Represented by Bill Wright, proxy,
at all meetings

16. Anthony J. Jones, III, President
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GENERAL RECOMMENDATIONS

We propose a single system of public higher education in Louisiana to be known as the University of Louisiana.

The existing management boards and the Board of Regents should be eliminated, to be replaced by a new policy-making, governing Board. The Board would have the power to define the role, scope and mission of each public institution of higher education in the State of Louisiana. The Legislature should appropriate to the Board in a lump sum the funds necessary to operate such institutions, and the Board should have the authority to allocate among such institutions the funds so appropriated.

The institutions of higher education now operating under the three management boards would be constituent components of the new single system governed by the new Board.

Colleges and universities would maintain their present names, amended to specify that each is part of the University of Louisiana. After two years in the new system, any institution may petition the Governing Board for a name change that will more clearly specify its role, mission and geographic location.

BOARD COMPOSITION AND ORGANIZATION

The new governing board, to be known as the Board of Governors, would be composed of fifteen members to be appointed by the Governor, with confirmation by the Senate after a timely public hearing. Terms of service on the Board would be six years, with no more than one re-appointment permitted. No individual would be permitted to serve more than twelve years. Terms of service would overlap, with the service of five members expiring every two years.

Initially, the Governor would choose one person from each of the three management boards and from the Board

of Regents as his first four appointees to the Board of Governors. In addition, he would appoint eleven other initial appointees. The fifteen initial appointees would be divided by the Governor into three groups of five each, to serve terms of two, four, and six years, respectively. Thereafter, the regular rotation of one third of the Board members' terms expiring every two years would be operative.

The Board would elect annually at its first regular meeting a Chairman, a Vice Chairman, and a Secretary and, thereafter, have regularly scheduled meetings throughout the year. The Board would provide for those standing and ad hoc committees as it deemed necessary for the conduct of the Board's business, and it would establish its own rules and order of business so long as they are not in conflict with state laws and practices.

SELECTION OF BOARD MEMBERS

The Governor shall, through his appointment powers, ensure that the members of the Board of Governors are broadly representative of the state's geographic, racial, gender, ethnic and political composition.

The selection of individuals for appointment, and the resulting mixture of persons comprising the Board of Governors, is the most important factor affecting the future quality of higher education in Louisiana. Every choice is a critical one. We cannot stress too strongly the necessity of appointments of persons of intelligence, experience, concern and commitment.

Since the quality of Louisiana's higher education must compare favorably with that available in other states and the world, we should not hesitate to learn and profit from the experience of others. The appointment of one or more non-Louisianians with unusual qualifications and experience could be most helpful.

In the past, persons with previous experience in higher education have made notable contributions to the Coordinating Council and the Board of Regents. Such experience should be considered, but not be mandatory, in the selection of some nominees for the Board.

No person should be eligible for appointment to the Board, or be permitted to continue to serve thereon, who is or becomes, or is married to, or marries, a member of the legislature, an elected or appointed official or employee of the state government, or an employee of the Board or any of the constituent institutions.

Active participation in the Board's deliberations and decisions by every Board member is necessary for the success of the Board's mission. We urge the Board to consider and adopt by-laws or rules to that end.

POWERS OF THE BOARD

The Board of Governors should be granted the broad and general authority and power to develop, sustain and govern the sole system of public higher education in Louisiana and all of its components. That power and authority should include but not be limited to:

1. The development and maintenance of a Strategic Plan for Louisiana Higher Education.

The Plan should include a defined role, scope and mission for each institution or unit of the higher education system. The Plan should reflect the educational aspirations of the state and take into consideration the long-range needs of the state and its citizens as well as those functions presently being performed by existing institutions of public higher education in Louisiana. The Board should have full authority to carry out the Plan.

Pursuant to the Strategic Plan for Louisiana Higher Education, the Board would be responsible for the general determination, control, supervision, management and gov-

ernance of all affairs of the constituent institutions. In that connection, the Board would be authorized to adopt such policies and regulations as it may deem wise. The Board would be authorized and encouraged to delegate any part of its authority thought appropriate by it to the President of the University and, through the President, to the Chancellors and other officials of the University and its component units.

2. The search for, identification of, and employment of the key officers of the systems and the Chancellors of the component units.

The Board of Governors would be encouraged to establish high standards, great expectations, and commensurate compensation as it seeks the best qualified individuals to lead our efforts in higher education.

The Board would be authorized to elect a President of the University, who would be the Chief Administrative and Chief Executive Officer of the University. The President would be authorized to recommend the initial administrative structure and system personnel requirements to the Board for its approval. Thereafter, the President would be authorized to recommend to the Board those individuals the President deems best qualified as senior officers of the University and Chancellors of the constituent units. All would serve in such roles at the pleasure of the Board. Provision should be made within the President's professional staff for persons of high competence and strong professional experience in such areas as academic affairs, public-service programs, business and financial affairs, institutional studies and long-range planning, student affairs, research, legal affairs, health affairs, institutional development and economic development.

The President should have complete authority to manage the affairs and execute the policies of the University and its constituent institutions, subject to the direction

and control of the Board of Governors. The President should personally represent before the state, the region and the nation the ideals and the spirit of the University. As the chief executive, the President should be the official administrative spokesman for, and the interpreter of, the University to the alumni and alumnae, the news media, the educational world, and the general public. The President should be responsible for the presentation and interpretation of all University policies, recommendations and requests to the Legislature, the Governor, state officers and commissions and the Federal Government.

The President, as the chief executive officer of the University, would perform all duties prescribed by the Board of Governors. The President would be responsible to the Board of Governors for the prompt and effective execution of all laws relating to the University and of all resolutions, policies, rules and regulations adopted by the Board for the operation of the University and for the government of any and all of its constituent institutions, and the President's discretionary powers should be broad enough to enable the President to meet his or her extensive responsibilities.

The President would be directed to prepare and submit to the Board of Governors an annual report and, in addition, such other reports and recommendations concerning the University and its constituent institutions as the President may deem wise or as the Board may require.

The President would be authorized to make nominations for all appointments that are to be acted upon by the Board of Governors and to make recommendations for all promotions, salaries, transfers, suspensions and dismissals that are to be acted upon by the Board. The Board would, however, reserve the right, in all instances, to act on its own initiative.

3. Absolute and final control over degree programs, education and administrative units, new institutions

(subject to legislative authorization) and the reduction, closing, extension or merging of existing institutions, the names of institutions, off-campus instruction, admission standards, articulation or credit transfer, joint educational arrangements with private colleges and universities and other agencies of the state government and its subdivisions.

4. Budget and financial control of all units and institutions in the University system.

The President of the University, with the assistance of the staff and the Chancellors of the institutions, should initially develop and annually update a plan to meet equitably the financial requirements of the University's units. The plan should reward high quality instruction, research, and public service.

The President annually should cause the preparation of a comprehensive budget for operations, including all available revenue sources, and a budget for capital improvements, both of which should be presented to the Board of Governors for review and consideration. Upon approval by the Board, there would be submitted to the Legislature a request for appropriations for higher education based on the approved budgets.

Appropriations should be made to the Board of Governors of the University as a lump sum, and the Board should have the authority to revise the budgets to conform to available funds and to distribute allocations to the institutions.

The Board should be authorized to establish one or more special endowment funds which may receive private contributions, any state appropriations, and, at the end of the fiscal year, any unspent budgeted operating appropriations. The endowment income should be used for stated purposes, but the principal should not be subject to invasion.

THE DIVERSE ROLE OF THE INSTITUTIONS

Louisiana must have a variety of high quality institutions of higher education so the state and its citizens can compete favorably in the nation and in the world. Diversity and quality are demanding of limited resources. Therefore, the Board must plan and build specific strengths at each institution. Unwarranted program duplication, especially those of less than high quality, should be eradicated and should not be permitted to recur. The institutions should be diverse and differentiated by tradition; faculty and resources; defined rule, scope and mission; and state and area needs.

We propose that there be four categories of institutions as measured by the type, variety and number of degrees granted, the varying emphasis on instruction, research and public service, and standards for admission to undergraduate education. They are:

Doctoral I. This institution should constitute the state's single "flagship" university. It should offer multiple doctoral programs of the highest possible quality, enroll and graduate a sizable number of doctoral recipients, engage in diverse, organized research, and include professional schools. Undergraduate admission standards should be the highest of any of the state institutions.

We recommend that a reconstituted Louisiana State University (consisting of LSU-BR, the Law Center, and the Agricultural Center under one Chancellor) be the Doctoral I institution.

Doctoral II. These institutions should offer a limited number of carefully selected doctoral-level and/or professional programs, other post-baccalaureate offerings, and strong baccalaureate programs. Faculty research and public service for the state and area should be encouraged. Admission standards, while less than Doctoral I, should be higher than those for the Baccalaureate institutions.

Baccalaureate. These institutions should concentrate on undergraduate baccalaureate level offerings. There may be very limited masters-level and specialized graduate offerings. Admission standards of the baccalaureate program should be some combination of graduating class rank, test scores, and/or a transcript of satisfactory high school credits.

Admission to a two-year junior division of such institutions should be authorized for every high school graduate. Certificate and associate degree programs should be offered.

Two-Year or Community College. This group of institutions should provide certificate and associate degree offerings as well as demand-justified undergraduate course offerings for transfer to baccalaureate degree-granting institutions.

Careful studies should be made of Delgado Community College and other states' experience in the area of combined academic education/vocational-technical training to see if such combinations, operating within the higher education framework, offer distinct advantages for Louisiana students and the state's economic progress. If so, vocational-technical institutions should be placed under the governance of the Board.

FUNDING FOR HIGHER EDUCATION

Present funding for higher education is woefully inadequate when compared with other states. It is estimated that an additional $160 million in state appropriations would be required in the next fiscal year if Louisiana expenditures for that purpose are to equal the average of Southern (SREB) states. However, we should strive not to be equal to the average of the Southern (SREB) states, but to be the best in the South. Hence, substantial additional funding should be provided for higher education, even as cutbacks are required in other

areas. By so acting, Louisiana will demonstrate to the Nation our commitment to education as our number one priority.

While the reorganization of higher education proposed by the Advisory Panel will make better use of available funds, it is no substitute for the additional appropriations required to improve and sustain the desired quality of public higher education in Louisiana. While some staged implementation of such an ambitious funding program may be required, the implementation of a policy of substantially increased funding for Louisiana public higher education (even at the cost of reductions in state spending in other areas and, if necessary, higher taxes) should begin at once.

Also, needing change is the policy of holding institutions harmless by maintaining financial support at a previous level in spite of changes in the institution's operations which would normally reduce the funds to which it is entitled. The concept of hold harmless should be eliminated. A staged elimination should provide time for all affected to accommodate to the new practice. We suggest a phase out over two years.

INSTITUTION ADVISORY BOARD

We recommend the establishment of Advisory Boards for each unit in the higher education system.

The size of each board should range from seven (7) to twenty-one (21) members, as authorized by the Board of Governors.

Members of the Advisory Boards should serve four-year terms with one-half of the membership's terms expiring every two years. Members should be permitted to be re-appointed only once, with total service limited to eight years.

Appointments to such Advisory Boards should be recommended by the Chancellor of the particular institution and the President of the University, with confirmation by the Board of Governors.

The Advisory Boards should meet on the call of their respective Chancellor, but at least quarterly.

The responsibility of the Advisory Boards should be to advise and assist the Chancellor of their respective institution, in such ways as the Chancellor proposes, in improving the standing of the institution and the quality of its program.

ECONOMIC DEVELOPMENT

Assistance in the economic development of the state of Louisiana should be a prime responsibility of the University of Louisiana. The President of the University should develop, in collaboration with the appropriate agencies of state government and the private sector (including private institutions of higher learning), a plan to support the state's economic growth and development by the best utilization of public higher education's talents and resources. Specific suggestions have been proposed by the Advisory Panel on Economic Development.

Budget provisions should be made for this activity, and the Legislature should authorize and appropriate funds for this purpose.

An annual report of activities and accomplishments should be made to the Board of Governors, the Legislature, and the Governor.

ACCESS

It should be the policy of the state of Louisiana that access to the opportunity for higher education shall be provided for all individuals who have earned a high school diploma.

While an open admission policy should not, as discussed under "The Diverse Role of the Institutions", be available at every institution, the Board should try to make basic higher education available and affordable through the best use of facilities and resources of existing institutions. Where higher admission standards are required, such standards should be implemented in stages over a reasonable period of time.

Financial assistance on the basis of need should be provided through grants, loans, scholarships, employment or some combination of all for as many as possible.

COORDINATION OF EDUCATION

There should be established a Council on Education for the State of Louisiana.

The Council should have the responsibility for coordinating the planning and policy-making of all major agencies and groups, public and private, involved in education. The Council should be composed of the following:

1. The Chairman and Vice Chairman of the Board of Elementary and Secondary Education.
2. The Superintendent of Education.
3. The Chairman of the Louisiana Catholic Conference Superintendents Committee representing parochial schools of the Roman Catholic Dioceses in Louisiana.
4. The Chairman and Vice Chairman of the Board of Governors, University of Louisiana.
5. The President of the University of Louisiana.
6. The Chairman of the Board of the Association of Independent Colleges and Universities.
7. The President of the Association of Independent Colleges and Universities.

8. A representative of the independent schools (K-12), now organized as the Louisiana Independent School Association.

9. A representative of the proprietary schools (K-12 and post high school) now organized as the Louisiana Association of Private Schools and Colleges.

10. The Chairmen of the Education Committees of the Louisiana Senate and House of Representatives.

The Council shall report annually, and more frequently if appropriate, on the state of education to the Governor, the Louisiana Legislature, and the citizens of the state. The Governor is encouraged to consult with the Council and to use its services to improve the quality of education, and the quality of life in the State of Louisiana.

The President of the University of Louisiana should serve as Chairman of the Council, and staff assistance should be authorized from the higher education system for the Council's work.

INDEPENDENT COLLEGES AND UNIVERSITIES

For over 160 years independent colleges and universities have served the citizens of Louisiana. Over 20,000 students annually receive quality and value measured education from these valuable assets of our state.

In 1975 the Legislature enacted the Aid to Independent Institutions legislation and appropriated $125 per semester for each FTE Louisiana undergraduate. In 1984, the Act was amended to raise that amount to "1/10th of the average state formula appropriated for full-time students in Louisiana's publicly-supported colleges and universities during the preceding fiscal year." But since 1984 no money has been provided for that appropriation.

In 1987-88, an appropriation of less than $6 million would be required to satisfy this act.

These independent institutions educate many Louisianians. Without them, education costs for the state would increase sharply. More importantly, these institutions are valuable yard sticks against which we can measure performance by public institutions in the areas of quality and value.

We believe state financial assistance for these institutions and their students is justified and deserved. We recommend that appropriations be made to fund fully the aid to Independent Institutions' program as soon as possible.

Background on Panel Meetings

In December, 1987, Governor-elect Buddy Roemer named an Advisory Panel for Higher Education. The letters of appointment stated that "the panels are designed to give Buddy and the transition team a broad perspective on the issues." The charge of the panels is to make general consensus recommendations to Buddy by March 1, 1988.

The panel's first meeting was held on Thursday, January 7, 1988 at Pleasant Hall on the LSU-Baton Rouge campus.

The Governor-elect, appearing at that first meeting, outlined the panel's purposes and responsibilities. He requested that the group "study the structure and governance of higher education; the quality of Louisiana's institutions and offerings; the role of education in economic development, and in keeping our best and brightest graduates at home."

He also stressed his concern with the relationships between higher education, elementary and secondary education, and vocational-technical education. He named the states of North Carolina, South Carolina, and Oklahoma

as respective examples of educational excellence in each of these fields and urged the panel to make recommendations to improve Louisiana's efforts in these areas.

Others invited to make presentations at the first meeting were Dr. Kerry Davidson, Deputy Commissioner for Academic Affairs of the Board of Regents, and Mr. Marvin Roubique, Deputy Commissioner for Finance, Board of Regents.

The panel's second session was Wednesday, January 20. Making presentations at the meeting were Mack Barham, attorney for the Board of Regents, Mrs. Sharon Beard, Deputy Commissioner for Planning and Research, Board of Regents, and Emogene Pliner, Vice President of Public Affairs Research Council and a panel member.

The first two speakers dealt with the Higher Education Consent Decree, its future, and its possible effect on any proposed change in structure, governance, institutional admittance standards and other facets of higher education. Miss Pliner reviewed the history of educational developments in Louisiana to promote a better understanding of how we arrived at our present status.

At the meeting on Wednesday, January 27 to which representatives of the three management boards and the Regents had been invited, there were many suggestions.

Appearing were: Mr. Robert Wright, Chairman, Board of Trustees of Colleges and Universities, and that System's President, Dr. Larry Crain; Mr. Joe Terrell, Chairman, Board of Supervisors of Southern University; Dr. Allen Copping, President of the Louisiana State University system, and Bill Silva, Vice President for Finance and Administration; Robert Bodet, Chairman of the Board of Regents, and Mrs. Sharon Beard, Acting Commissioner of the Board of Regents. Also heard from were Dr. William Arceneaux, president of the Association of Independent Colleges and Universities and former Com-

missioner for Higher Education of Louisiana; and the Honorable William Jefferson, attorney for the Southern Board of Supervisors in the Consent Decree matter.

The panel convened on Wednesday, February 3rd, to hear from Dr. Roy Carroll, Vice President for Planning, of the University of North Carolina.

A full morning of discussion gave the group an excellent opportunity to become fully conversant with higher education in North Carolina.

Following lunch, Jim Clinton, President of Gulf South Research Institute was invited to speak on the role of Higher Education in Economic Development through Technology Transfer.

The co-chairperson of the Vocational/Technical panel provided an interim report on that group's findings.

Wednesday, February 10, had been set aside for a full discussion of issues concerning possible structure and governance. Danny Walker acted as chairman in the absence of Chairman Smith who was ill. Full discussion ensued with some consensus reached.

Former Representative, now Senator, John B. Hainkel asked to be heard. He urged the panel to make strong recommendations for changes in higher education.

Stephanie DeSelle reported on a meeting of Chairman Smith with four Senators—Bares, Brinkhaus, Osterberger and Picard. They expressed their willingness to hear and act on the panel's recommendations.

The panel convened on Thursday, February 18, and discussed a proposal for changing the higher education system. There was strong consensus on a number of points. It was proposed that written drafts be prepared for the determination of final wording and formal action.

The panel met at 9:30 a.m. on Wednesday, February 24.

First on the program was Miss Sally Clausen, Commissioner for Higher Education, Board of Regents. She outlined her plans and goals for the Board of Regents and pledged the assistance of her staff in the panel's work.

Because of the need for coordination in the area of education, the chairpersons of two related advisory panels were invited to outline the findings and tentative recommendations they would make to Governor-elect Roemer.

First was Colleen Andrus of the Elementary and Secondary education group, followed by Barbara Manner of the Vocational/Technical Education panel.

They were followed by Tim P. Ryan, a co-chairman of the Economic Development Advisory group who spoke on higher education's role in economic improvements.

The final planned speaker of the morning was Jake Netterville who has chaired a team of accountants charged with examining higher education finances to try to identify areas of cost reduction and resultant savings.

A non-scheduled presentation to the panel was made by the Chancellor of the University of New Orleans, Dr. Gregory M. St. L. O'Brien.

Following lunch Dr. Bill Cooper of the panel presented comparative higher education appropriation figures for Louisiana and SREB states.

The group concluded the day by discussing and approving in part a draft of statements formulated from the consensus reached the previous week. Re-drafting would be done with several new sections added for final consideration on the morning of Thursday, March 3.

The group met at 9:30 a.m. on Thursday, March 3.

The draft of the proposed report to Governor-elect Roemer was distributed for discussion and action. The report, as amended, was adopted.

In the afternoon, the panel heard from Robert Scott, president of the Community College System of North Carolina, a former Governor of that state, who was instrumental in the change in that state to the present system.

His presentation and subsequent discussion, particularly in the area of vocational-technical training for economic development, caused the panel to recommend further study of the governance of vocational-technical education and training.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action Number 80-3300
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISANA, *et al.*

AFFIDAVIT OF WILLIAM D. HAWKLAND

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared:

WILLIAM D. HAWKLAND

who, being first duly sworn, deposed and said that:

1. Since 1979, I have been Chancellor of the Paul M. Hebert Law Center (Law Center), which was formerly known as the Louisiana State University Law Center. It is part of the Louisiana State University System and is located in Baton Rouge, Louisiana.

2. As the chief administrative officer of the Law Center, I have knowledge of the facts set forth below.

2. Since my initial appointment, I am not aware of anyone who has been excluded from participation in,

been denied the benefits of or been subjected to any discrimination under any program or activity on any campus within the LSU System on the ground of race or color.

4. The Law Center has complied in good faith with all obligations which it asumed under the terms of the 1981 Consent Decree entered in this action. The Law Center has taken substantial affirmative action to assure equal educational and employment opportunities. Special recruitment strategies have been implemented in the effort to increase black enrollment. These special recruitment strategies are more fully documented in the affidavit of Eulis Simien, Jr., Other-Race Recruiter for the Law Center, who has primary responsibility for increasing other-race presence on the Law Center campus.

5. Regular admission to the Law Center is based upon objective admission criteria. In order to qualify under these criteria, a student needs a 90 index. This index is calculated by taking the sum of 2 X the LSAT score and 10 X the grade point average (GPA). For example, a student with a 3.0 GPA would need an LSAT score of 30 in order to qualify under our regular admission criteria.

6. Recent statistics made available from the Law School Admissions Council/Law School Admissions Services are attached as Appendix "A." These statistics are indicative of the disparity in the traditional indicators of law school success between Black and Caucasian law school applicants. In terms of numbers, in the 1986 application year, there were only 294 black applicants in the entire country with a 30+ LSAT score and 3.0+ GPA. Accordingly, only a very small number of blacks qualify for admission under the regular admission criteria of the Law Center. The mean for blacks is 21.19 LSAT and 2.62 GPA. For whites, the mean is 31.27 LSAT and 3.02 GPA.

7. Since there are relatively few blacks with good indicators of law school success, there is very intense competition among over 170 ABA-approved law schools to enroll this same pool of students. Based upon information received from admission officers in other schools, it is believed that most blacks who qualify under the Law Center's regular admission criteria would also qualify for admission to any other law school in the country. Also, it is difficult for the Law Center to complete successfully with New Orleans for black law students. The highest percentage of blacks in the state is in New Orleans and, with two law schools located in New Orleans, it is difficult to attract black law students to Baton Rouge.

8. In an effort to increase black student enrollment, the Law Center admits blacks who do not qualify for admission under the regular admission criteria. The Law Center has found, however, that students substantially below the regular admission criteria are usually lost to attrition. Since the loss of substantial numbers of blacks to attrition would be counter-productive, the Law Center seeks to admit only those black students who are fairly academically solid. These students are still within the group for whom there is substantial competition.

9. While the Consent Decree provided special scholarship funds for certain professions, none was made available to the Law Center. The Law Center has used its own resources to assist in the recruitment of minority students. In 1988, the LSU Board of Supervisors authorized the Law Center to award up to 10 three-year tuition waivers per year to minority students. It is hoped that this financial support will assist in the competition for black candidates.

10. The Law Center is committed to the principles of equal educational and employment opportunity, and it

will continue its affirmative efforts to assure equal educational and employment opportunity.

/s/ William D. Hawkland
WILLIAM D. HAWKLAND

SWORN TO AND SUBSCRIBED before me this 30th day of May, 1988.

/s/ Daniel J. Birsten
Notary Public

[Appendix A Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action Number
Section "A"

UNITED STATES OF AMERICA

versus

STATE OF LOUISIANA, *et al*

AFFIDAVIT OF EULIS SIMIEN, JR.

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared:

EULIS SIMIEN, JR.

who, being first duly sworn, deposed and said that:

1. On January 1, 1982, I became the Other-Race Recruiter for Paul M. Hebert Law Center (Law Center), which was formerly known as the Louisiana State University Law Center. It is part of the Louisiana State University System and is located in Baton Rouge, Louisiana. I am an assistant professor of law with the Law Center and except for the academic year 1985-86 I have been teaching at the Law Center since the 1984-85 academic year. During 1985-86, I was pursuing graduate legal studies at Columbia University School of Law.

2. From my experience at the Law Center, I have knowledge of the facts set forth below.

3. Since my initial employment with the Law Center, I am not aware of anyone who has been excluded from participation in, been denied the benefits of or been subjected to any discrimination under any program or activity on any campus within the LSU System on the ground of race or color.

4. The Law Center has taken substantial steps to ensure educational opportunity for students for all races, to increase other-race student enrollment, and to assist other race students in their successful completion of their studies at the Law Center.

5. In Summer, 1987, the Law Center instituted a new program for black students whose admission statistics were below the regular admission criteria but who the admissions committee believed might be successful in law school. These students are admitted to the law school on the condition that they successfully complete a four-week course in the summer prior to their first year. The purpose of the course is to allow a member of the faculty an opportunity to assess the students' potential for success and to teach some of the skills needed for successful transition into law school. In addition to the conditionally admitted students, the course is offered to all black students who do not meet the regular admission criteria.

6. The Law Center has also instituted an Information Weekend held in the spring of each year. The Law Center writes to pre-law advisors at undergraduate schools in this geographic area of the country and issues personal invitations to black students who are interested in attending law school. The students are provided with lodging and meals during the weekend and are presented with seminars, mock classes, and information on financial aid. Black speakers are featured and black practicing lawyers are present to encourage the students and provide information to them. The Information Weekend is intended to promote interest in attending the Law Center

and to assist the student who does enroll in successfully completing the law school curriculum.

7. Upon request of the Law Center, the Law School Admissions Council provides information on black students from Louisiana, Texas, Mississippi, Georgia, Alabama, Florida and Arkansas. The students from this list which would appear admissible (either conditionally or unconditionally) are contacted and encouraged to attend the Law Center. In addition to visits to undergraduate campuses in this geographic area of the country with high concentrations of black students, a representative from the Law Center attend the Chicago Law Forum presented by the Law School Admissions Council. The purpose of these visits is to attract black undergraduate students interested in law to the Law Center.

8. A Law Center Black Alumni Association was recently formed. This association allows for a closer relationship between the Law Center and its black alumni. The first year of the association was very successful.

/s/ Eulis Simien, Jr.
EULIS SIMIEN, JR.

SWORN TO AND SUBSCRIBED before me this 27th day of May, 1988.

/s/ Warren L. Mengis
Notary Public

A BRIEF STATEMENT

BY

B. K. AGNIHOTRI
CHANCELLOR
SOUTHERN UNIVERSITY LAW CENTER

REGARDING

SITUATION OF SOUTHERN UNIVERSITY LAW CENTER IN LITIGATION OVER DESEGREGATION OF HIGHER EDUCATION IN LOUISIANA

SITUATION OF SOUTHERN UNIVERSITY LAW CENTER IN LITIGATION OVER DESEGREGATION OF HIGHER EDUCATION IN LOUISIANA

OVERVIEW

Since 1985, the Law Center has been a distinct and administratively separate part of the SU System, on the same level as SUBR, SUNO, SUSBO, with its own Chancellor, budget, and line of reporting directly to the System President. The relevant features of the Center's operations need over-all description and understanding in the current discussions.

Desegregation of the Law Center is neither an objective, ideal, or hope of the Law Center—it is an *accomplished fact.* There is probably no other part of Louisiana higher education so admirably attuned to the aspirations to race-neutral higher education which motivate the state and federal agencies in the ongoing effort.

For this reason, the Law Center should be disassociated altogether from those institutions of higher education being viewed as targets of desegregation measures. On the contrary, its only place in those strategies should be as model.

Furthermore, the inclusion of the Law Center in those strategies undermines public confidence in the true basis and feasibility of desegregation, and demoralizes those engaged in its implementation. No likelier effect than that can be foreseen if the "*flag-ship*" *of desegregation* is subjected to the same unsettling decrees as those which may be justified for those not in compliance, to assure that they become so.

Thus every change suggested for the Law Center's operation—desegregated to the envy of most of the state's other institutions—should be required to come with a per-

suasive argument that further race-neutrality is needed: that the change carries more promise of success than those earlier and successfully made; and that the change is not sought for unrelated reasons that jeopardize desegregation in place.

BASIC FACTS

1. DESEGREGATION ACHIEVED

The Law School is and has been fully desegregated:

(A) Faculty

Full-time:

Black	— 60%
Non-black	— 40%

Part-time:

Black	— 45%
Non-Black	— 55%

Over-all:

Black	— 50.3%
Non-black	— 49.7%

(B) Student Body

Black	— 58%
Non-black	— 42%

2. EXPLANATION OF ACHIEVEMENT

This race-neutrality has been uncoerced, genuine and exemplary.

The Southern University Law Center adheres to and promotes the principle of equal opportunity without regard to race, sex, color, creed or national origin. Although conceived and bred in a not-so-color-blind era, it has developed into the quintessential institution personifying those tenets of truth, equality and justice which constitute the very foundation of the American creed. Of course, this achievement did not come into fruition over-

night nor may it be attributed to the vagaries of coincidence or happenstance. Rather, this present success story—notwithstanding overwhelming obstacles—is the handiwork of persons with vision, dedication, devotion, compassion and an inveterate commitment to the belief and principle that excellence and accomplishment are indeed color-blind.

An environment of harmony had to be created for attracting students of all races; a welcoming willingness and conscious moves had to be made to desegregate faculty thereby inspiring confidence in all constituents of the Law Center.

3. ACHIVEMENT IN CONTEXT OF TOTAL EFFORT

This spectacular achievement has produced at least three much desired results:

1. Not only lawfully required desegregation, but indeed full integration of a state institution of higher education.
2. A cadre of black lawyers and leaders that would not have otherwise come into existence.
3. A role model for other institutions to emulate.

The *Master Plan for Higher Education*, mentioned later, rightly concluded (p.8):

> "It is our conclusion, then, that it is essential for the well-being of all the people of Louisiana, not just the blacks, for Southern University Law School to remain in existence and to grow in size and strength."

4. SHORT-SIGHTED MEASURES BORROWED FROM OTHER CONTEXTS

The Law Center achieved desegregation under the Consent Decree without being required to follow any specific

measures, by good faith, sincere, and innovative means of its own wise choosing. Other segments of higher education did not. It is to be expected then that a variety of specific remedies will be ordered, designed to force others into paths the Law Center voluntarily pursued. Among such measures will be, no doubt, financial inducements for faculty, students, and staff to move about in race-neutral settings; targeted recruitment programs; curriculum splits to shunt students into paths where desegregation is desired.

5. COST-BENEFIT CONSIDERATIONS IN REMEDIES PURSUED FOR THEIR OWN SAKE

There was one over-arching factor favoring the result of the Law Center's de-segregation effort—it was voluntary, sincere, and pursued in subdued, patient action visibly grounded in the most familiar reasons for desiring race-neutrality, reasons embedded in various views of history, religion, and human dignity. The silence of the Consent Decree as to specific measures made this possible, and the different approach at many other institutions made the Law Center's approach all the more keenly felt and affectionately embraced. Without that true perception of the effort as "desegregation from within," results would have seemed too gradual in coming, means too intrusive on other desiderata.

The risk of blanketing the Law Center under the whole spectrum of remedial decrees discussed as possibilities in another section is precisely that the very spirit of the Law Center's program in this regard—a model of attitude —will be destroyed instead of rewarded.

6. RADICAL PROPOSALS FOR MERGER OR RELOCATION

Relocation

Some persons unfamiliar with the Law Center's situation have gone so far as to consider the possibility of physically relocating the Law Center, evidently without

pausing to consider how that measure could conceivably promote further desegregation. The advantages (in this and other respects) of *not* re-locating it are pointed out in Appendix C of the 1977 *Master Plan for Higher Education* (p. 9), commissioned by the Board of Regents, as follows:

> "We have also concluded that the Law Center should not be moved to another location. Just as there are advantages to LSU from being located in the state capital there are advantages to Southern being there. Those advantages include proximity to state government, the availability of summer jobs in government, and most important of all, the present location in a predominantly black community as part of a predominantly black university."

More to present purpose, the consultants (the Dean of Stanford and Associate Dean of the University of Illinois law schools) conclude:

> "Move to any other location would deprive the law school of these benefits and would run the very high risk of converting the school to a predominantly white institution. The latter, in turn would raise anew the problems of providing legal training for blacks observed at the other existing institutions."

Merger

In similar haste and apparent lack of familiarity with the Law Center's success, some have considered merger with the other state-supported law center as a remedy—certainly not for any problem at this one—but for problems at the other. Such a merger would dilute in a combined program the expertise achieved as this Law Center, without any accompanying justification for believing that the expertise cannot be developed independently there, the way it developed here. Moreover, merger under the auspices of this, the smaller school, seen as the desegregation

"flagship," would surely be rejected, while merger in the reverse relation presents a formidable array of indescribably complex problems, including killing "desegregation goal."

SUMMARY

The Faculty and Staff of the Law Center recognized that their first responsibility is to serve the state's higher education goals, and with impeccable race-neutrality. This they have done. *The work done deserves to be left undisturbed and as a model, not a casualty, in far-sighted, voluntary, sincere and effective desegregation.*

APPENDIX C

MASTER PLAN

HIGHER EDUCATION

June, 1977

Dr. William Arceneaux
Louisiana Board of Regents
Suite 1530, One American Place
Baton Rouge, Louisiana 70825

Dear Dr. Arceneaux:

Submitted herewith is the report requested by the Louisiana Board of Regents on the most effective means of meeting Louisiana's need for legal education.

We trust that the report will be of assistance to you in your planning efforts.

Sincerely yours,

/s/ Peter Hay
PETER HAY
Associate Dean, School of Law
University of Illinois

/s/ Charles J. Meyers
CHARLES MEYERS
Dean, School of Law
Stanford University

Report to the Louisiana State Board of Regents on Legal Education in the State of Louisiana

(June, 1977)

Peter Hay
Associate Dean
College of Law
University of Illinois

and

Charles J. Meyers
Dean
Stanford Law School

I. Introduction

At the invitation of the Louisiana Board of Regents, we visited the four law schools of the state on May 30 and 31, 1977, spending one-half day at each school. Our charge was to consider whether legal education in Louisiana is efficient and effective in producing an adequate number of qualified lawyers to satisfy the needs of the people of Louisiana for legal services. In preparation for this task we read the following reports:

1. Commissioners' Conference on Professional Manpower Needs. "The Supply and Demand of Lawyers in Louisiana: Past, Present and Future Trends (1976)" (hereafter referred to as the Board of Regent's manpower study).
2. Louisiana Bar Examination Results 1969-70 to 1975-76.
3. Louisiana Attorney Statistics.
4. Applicants, Enrollments and Graduates for Louisiana Public and Independent Law Schools.
5. The Bulletins of the four Law Schools.
6. Miscellaneous maps.

At each school, Loyola, Tulane, LSU and Southern (the order in which we made our visits), we conferred with school officials, faculty members and students. Our guide for these visits was Ms. Sharon Beard, whose unfailing helpfulness and graciousness we wish to acknowledge here.

On the basis of the information obtained from the publications listed above and from our conversations at the four schools, we respectfully submit this report.

II. Do existing institutions provide an adequate supply of lawyers for Louisiana?

We conclude that the existing institutions provide a sufficient number of lawyers for the State of Louisiana and that, subject to the special needs addressed in Part III below, there is no need for expansion of educational facilities. Similarly, we conclude that there is no serious oversupply of lawyers so as to warrant a reduction in educational opportunities.

The 1976 manpower study of the Board of Regents documents that, in 1970, the ratio of lawyers to total population in Louisiana was 1:662, compared to a national average of 1:572. (Table XIV, at p. 36). For the southeastern region, this ratio compares favorably with Alabama, North and South Carolina (1:974, 1:1,095, 1:1,089, respectively), among others and is only slightly behind Texas (1:587). By 1976, the Louisiana ratio had dropped to 1:505 according to figures supplied by the Louisiana Bar Association. The Board of Regents' study projected (at p. 43) that the ratio would be 1:420 in 1980 and 1:305 in 1990, considering both expected production of new lawyers and separation from the profession of current members of the bar. Given the criteria for the projection, Louisiana's future ratios may thus be expected to bear the same relationship to national and regional ratios as does the present ratio.

In some respects, the expected future ratios may signal a future overabundance of lawyers, even if one also posits a modest increase in total population. Indeed, our interviews at some of the institutions visited disclosed that some law students experience difficulties even now in securing employment. Illustratively, placement figures at Loyola University Law School for 1976 show that of 187 graduating students, 161 found employment, while 26 did not, at least not within a reasonable time from graduation.

The possible present overabundance of law graduates, however slight, and the expected overabundance in the future, which the projection would signal, may not present an accurate picture in all respects. Especially with respect to the projected overabundance, we anticipate that law school enrollment will decline in Louisiana in about the same proportion as it is now beginning to decline nationally. In addition, and quite importantly, Louisiana's civil law system undoubtedly affects the projection in a way not recognized in the Board of Regents' manpower study which, in turn, was based in part on Chancellor Pye's earlier (and undifferentiated) study of the entire southwest region. Thus, while some Louisiana trained lawyers may be expected to seek employment in other state (for instance, 43 of 161 Loyola University graduates did so in 1976), lawyers from other states will not so readily move to Louisiana for lack of training in the civil law. The projection of a lawyer/population ratio is therefore very difficult, but the supply of lawyers may be expected to be less abundant than indicated in the studies mentioned. Nevertheless, it seems clear that even after adjustment of the projected ratio for the two reasons indicated, there is now, and will be in the future, a more than adequate supply of lawyers in Louisiana.

We are mindful of the fact that the geographic distribution of lawyers in Louisiana is uneven, for instance, that the ratios for Allen, Bossier, Franklin, Union, and

West Baton Rouge Parishes are most unfavorable (all in excess of 1:2,000). On the other hand, there is clearly an overabundance of lawyers, and consequently exceedingly limited further employment opportunities, in other parishes, most notably in Orleans Parish (1:201). This fact, however, does not support an argument in favor of new facilities for the training of lawyers, nor for the relocation of existing facilities. Additional facilities would add to the *state-wide* supply, and possible overabundance, of lawyers who would not necessarily locate themselves any differently geographically than at present. The same holds true with respect to relocation of existing educational facilities, since the place of law training within the state has no effect on the location sought by new lawyers for the practice of their profession.

While we are therefore convinced that no additional publicly supported educational facilities for the training of lawyers are needed, we recognize that the data on which we base our conclusion are projections, which cannot reflect the non-quantifiable factors mentioned, and that there could exist, from time to time, and however unlikely, a marginal need for additional lawyers. Such a contingency, however, does not warrant the creation of additional facilities: the start-up costs of a new facility in terms of physical plant and library facilities, which meet ABA/AALS standards, and operating expenses, including faculty salaries and library continuations and acquisitions, are prohibitive in terms of any cost/benefit analysis when the purpose is the education of that small margin of additional lawyers. Such a contingency should rather be met through utilization of existing facilities.

We assume that further expansion at Louisiana State University is not possible, nor perhaps educationally advisable, and that expansion of Southern University's Law School should be in accordance with the discussion in Part III, below. It is possible, however, to expand and utilize the programs now existing at Loyola University and

Tulane University. Their tuition levels ($2,200 in 1976/77 and $3,600 in 1977/78, respectively), however, place them out of reach for many qualified applicants who therefore have traditionally looked to public institutions. Should it become necessary to provide legal educational opportunities for a small number of additional students, the gap between tuition costs at public institutions and the two private law schools can be bridged, and their facilities utilized, by a system of capitation, from state funds, for qualified Louisiana residents wishing to attend these institutions (or out-of-state institutions on the basis of reciprocity). In economic terms, capitation is far less expensive as a means for providing limited additional educational facilities than the creation of a new state-supported and state-operated facility. We emphasize that we address this possibility as a contingency only and that we do not believe that it will arise. We reiterate our initial conclusion, as developed above, that there is no need for further educational facilities for legal training in Louisiana.

III. Education of Blacks for Law Practice

There are 1,085,227 blacks in Louisiana but only 176 black lawyers practicing in the state. (We do not deal with other minorities in this report because data are not available, but we have no reason to suppose that their situation differs materially from that of blacks, and it is the problem of the black minority which pervades legal education opportunity in this state).

A few statistics demonstrate that the problem of access to legal education by blacks is not improving. The black enrollment at Loyola is 5% (39 out of 796). Sixty percent of the black students there were admitted under a special admissions program which may not withstand the constitutional attack now pending in the U.S. Supreme Court (Bakke v. Board of Regents of the University of California). Moreover, the tuition at Loyola is currently

$2,200 per year, a sum beyond the means of most blacks. Similarly at Tulane, the black students compose 1.8% of the law student enrollment (10 out of 562). Tuition there in 1977-78 will be $3,600 per year. Again, it is unrealistic to expect significant numbers of black lawyers to be produced by that expensive and exclusive private institution.

LSU, though a public institution, has even fewer black students both absolutely and proportionately than Loyola and only a slightly higher percentage than Tulane. The LSU enrollment is approximately 1,000 law students, of which 2.5% (25) are black. The reason for this low number appears to be the belief of the law faculty that qualifications for law study are best determined by undergraduate grade point averages and scores on the Law School Aptitude Test—a belief shared by most legal educators. It would further appear that, by these criteria, very few of the black applicants to LSU rank as high as the white applicants and hence very few blacks are admitted. Unless LSU changes its admissions policy, which appears to be very unlikely, there is no realistic prospect of any significant number of black lawyers being produced from that school.

Accordingly, the one source of black lawyers for the people of Louisiana is Southern University Law School. Since the law school was established, it has graduated 274 students. The school has no information about 80 of them. One hundred fifty-three are members of the Louisiana bar and 41 are located in other states. As low as the number 153 is, the fact remains that Southern University has produced more black lawyers than the other three schools combined.

In sum, while the state-wide ratio of total population to lawyer is 505:1, the ratio of *black* population to *black* lawyer is 6,166:1—and even that dismal figure is largely accounted for by a single law school, Southern.

It is hardly necessary in this report to argue extensively the importance of producing more black lawyers in Louisiana. Law means access to political power both for the lawyer and his clients. The presence of blacks in the bar provides some assurance to other blacks that avenues of economic and social improvement are open and that black interests will be represented in the legal system. While the purpose of producing black lawyers is not solely to have them represent black clients, still many blacks prefer black lawyers and some blacks under some circumstances have difficulty in securing the services of white lawyers.

It is our conclusion, then, that it is essential for the well-being of all the people of Louisiana, not just the blacks, for Southern University Law School to remain in existence and to grow in size and strength. For reasons we will soon state, we also think that the school should remain part of the Southern University System, should retain its separate identification as a predominantly black institution and should remain in Baton Rouge.

The school should remain part of Southern University and retain its identity as a predominantly black institution because, we are convinced, the environment at Southern University comports with the black experience and contributes significantly to the education of the black student. Communication, and the ability to discern failure of communication, are greatly enhanced when the faculty and the students are products of the same or similar culture. Moreover, with a faculty-student ratio of 1:11, with special writing programs and with the availability of one-on-one tutorial instruction, the educational handicaps of black students can be overcome, or at least ameliorated.

The school should grow somewhat in size because of the need for more black lawyers, but the faculty-student ratio should be maintained at present levels to preserve

the individualized mode of instruction. The school should be strengthened and the education provided improved. The first step is to improve the plant and enlarge the library. The next step is to improve faculty salaries so that good instructors can be recruited and those now there retained. The third step is to improve financial aid for the students so that young people all over the state can afford a legal education if qualified to receive it. The final step, and indeed the crucial condition precedent to improving legal education at Southern, is to grant it stability by assuring it of a solid future. The Law School desparately needs assurance that it will receive the funds necessary to satisfy ABA standards and that it is, in the present mode of operation, an integral part of Southern University and of the system of legal education of the State of Louisiana.

We have also concluded that the Law School should not be moved to another location. Just as there are advantages to LSU from being located in the state capital there are advantages to Southern being there. Those advantages include proximity to state government, the availability of summer jobs in government, and most important of all, the present location in a predominantly black community as part of a predominantly black university. A move to any other location would deprive the law school of these benefits and would run the very high risk of converting the school to a predominantly white institution. The latter, in turn, would raise anew the problems of providing legal training for blacks observed at the other existing institutions.

IV. Conclusion

1. We believe that the four existing law schools, both public and private, provide an adequate supply of lawyers for the state of Louisiana, except for the problem addressed in Part III above and Point 4 below. Indeed, we foresee the possibility of a slight oversupply. We

therefore conclude that no additional educational facilities for the training of lawyers are needed.

2. The geographic imbalance in the location of lawyers within the state is not the result of the location of educational facilities and will not be ameliorated through the addition of new facilities or the relocation of existing ones.

3. Any demand for additional lawyers, while highly unlikely, should be met through utilization of the facilities of the private institutions. This should be done through a state-funded system of capitation as a far less expensive alternative to the establishment of new facilities.

4. Because we believe that there is an overwhelming need for an increase in the number of black lawyers in Louisiana and because we believe that Southern University Law School as presently conceived is the most viable means for satisfying that need, we recommend that the school retain its present racial identity and educational purpose, that it remain in its present location in order to retain that identity and purpose, and that it be given additional resources to enable it to do its job better.

CHAPTER 26. COLLEGES AND UNIVERSITIES

PART I. APPLICATION OF CHAPTER AND DEFINITIONS

La. R.S. § 17:3201. Application of Chapter

Except as otherwise specifically provided in this Chapter, the provisions of this Chapter shall apply in the same manner and to the same extent to the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical College, the Board of Trustees for State Colleges and Universities, and any other board vested with the supervision and management of institutions of higher education hereafter created.

La. R.S. § 17:3202. Definitions

Unless the context otherwise clearly indicates, the following words shall have the meaning hereinafter ascribed to each:

(1) "Board" or "boards" means the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, the Board of Supervisors of Southern University and Agricultural and Mechanical College and the Board of Trustees for State Colleges and Universities, or any of these boards.

(2) "College" means Delgado Vocational-Technical Junior College, and any other college now or hereafter under the supervision and management of one of the boards.

(3) "University system" or "system" means and refers to the colleges and universities under the jurisdiction of the management boards for higher education by or under authority of the Constitution of 1974.

PART II. MANAGEMENT BOARDS

La. R.S. § 17:3205. Qualifications of members of boards

No member of the faculty and no officer or employee of a university or college shall be eligible hereafter for appointment to any board which has authority for his/her appointment. However, this provision shall not prohibit the appointment of any person serving in an emeritus capacity to a board other than the board under which he served.

La. R.S. § 17:3206. Compensation of board members

Each member of the board shall be paid a per diem of fifty dollars for each day of actual attendance at meetings of the board or of a committee appointed by the board on which the member serves, or while on business for the board assigned by it, plus travel and other expenses incurred in the performance of official duties. Reimbursement of travel and expenses shall be in conformity with regulations governing such expenses of state officials.

La. R.S. § 17:3207. Executive committee of boards; powers and duties

A. For the prompt and efficient transaction of business each board may create from its membership an executive committee, which shall consist of the chairman and vice-chairman of the board and such additional number of members as the board shall determine. The members shall record the proceedings of each meeting of the executive committee.

B. A majority of the members of the executive committee shall constitute a quorum for the transaction of business; however, whenever the board has delegated to the executive committee full power to act with respect to a matter, affirmative action by a majority of the entire membership of the executive committee shall be required.

The executive committee shall meet monthly except in those months in which the board holds meetings.

C. The executive committee shall consider such matters as are referred to it by the board. It shall execute such orders and resolutions as shall be assigned to it at any meeting of the board. It also shall take such action as is necessary when an emergency requiring immediate action arises during an interim between board meetings. All acts of the executive committee shall be submitted to the board for ratification or rejection at its next meeting, except in matters where the board has delegated to the executive committee full power to act.

D. Each board may create and through its by-laws regulate the appointment, meetings, duties and functions of any additional standing or special committees which it deems necessary or expedient.

PART IV. ORGANIZATION

La. R.S. § 17:3301. Organization of university systems; colleges and universities

A. The organization of each university system and of each college and university within each system shall be determined by its board.

B. Each board shall appoint such administrative officers and other employees of the board as it deems necessary and designate their titles. In making its appointments, each board shall give consideration to the recommendations of the president or chief administrative officer and, in proper cases, to the head of any college or university affected by an appointment.

C. The compensation of these officers and employees shall be fixed by the board, and the officers so appointed shall serve at the pleasure of the board. Appointments of classified employees shall be in conformity with applicable civil service laws, rules and regulations.

D. Each board shall utilize the state department of education in order to coordinate and assist in its administrative duties and functions. Similarly, the state department of education shall utilize the resources of the boards.

La. R.S. § 17:3302. President of university system; appointment; salary

A. There shall be a president or chief administrative officer of each university system, who shall be the executive officer of the university system and shall serve as secretary to the board, executive committee and standing and special committees. He shall be appointed by and shall hold office at the pleasure of the board. His salary shall be fixed by and recorded in the proceedings of the board.

B. Except as herein otherwise provided and subject to the control and supervision of the board, each president or chief administrative office shall be responsible to the board for the conduct of the affairs of the university system. He shall execute and enforce all of the decisions, orders, rules and regulations of the board with respect to the conduct of the university system.

La. R.S. § 17:3303. Heads of colleges and universities

There shall be a head of each college and university, who shall be appointed by its board, taking into consideration the recommendations of the president or chief administrative officer of the system. The board shall adopt an appropriate title by which each head shall be designated. The head of each college and university shall serve at the pleasure of the board, at a salary fixed by the board.

La. R.S. § 17:3304. Faculty

A. Members of the instructional staff of each college and university having the rank of instructor or higher

and persons engaged in library, artistic, research and investigative positions of equal dignity, shall constitute the faculty of each college and university. The head of each college or university and its academic officers shall be members of the faculty.

B. The designation of faculty status by this Section shall not affect or change any provision of law affecting or relating to the retirement of any person, and the retirement of all faculty personnel shall be governed by applicable retirement or other applicable laws.

La. R.S. § 17:3305. Employment and compensation of faculty; administrative and professional staff; and classified employees

A. The head of each college and university shall appoint and fix the salaries and the duties of the members of the faculty and administrative and professional staff for the college or university he heads, subject to the recommendation of the president or chief administrative officer of the system and approval of the appropriate management board.

B. The head of each college and university, subject to applicable civil service laws, rules and regulations and approval by the president or chief administrative officer of the system and the appropriate board, shall appoint and fix the salaries and duties of the classified employees needed for the operation of the college or university he heads.

La. R.S. § 17:3306. Salary increases; restrictions

A. Beginning with the fall term of the 1984-1985 school year, and thereafter, all funds appropriated by the legislature for the purpose of granting salary increases, whether in a specified amount or in an amount determined by a percentage calculation, to all academic and administrative employees of the public institutions of

higher education over and above the salary paid to each such employee during the previous school year shall be paid by such institutions to each such employee as specified by the legislature, whether in a specified amount or in an amount determined by a percentage calculation.

B. No public institution of higher education or management board of any such institution shall divert any portion of the funds appropriated by the legislature as provided in Subsection A of this Section for any other purpose including but not limited to granting salary increases in amounts greater than those intended by the legislature to any such employee based on merit or for any other cause.

PART VI. POWERS AND DUTIES OF MANAGEMENT BOARDS

La. R.S. § 17:3351. General powers; duties and functions of college and university boards

A. Subject only to the powers of the Board of Regents specifically enumerated in Article VIII, Section 5(D) of the Constitution of the state of Louisiana of 1974, and as otherwise provided by law, each management board as a body corporate shall have authority to exercise all power to direct, control, supervise and manage the institutions of higher education under its control, including but not limited to the following:

(1) Sue and be sued, including the right to recover all debts owing to the board or any university or college under its management, and to retain legal counsel therefor.

(2) Actively seek and accept donations, bequests, or other forms of financial assistance for educational purposes from any public or private person or agency and to comply with rules and regulations governing grants from the federal government or any other person or agency

which are not in contravention of the constitution and laws.

(3) Receive and expend or allocate for expenditure to the institutions under its jurisdiction all monies appropriated or otherwise made available for purposes of the board and/or the institutions under its jurisdiction.

(4) Borrow money and issue notes, bonds or certificates of indebtedness for the same and pledge fees, rents and revenues to guarantee payment thereof, in accordance with law and with approval of the State Bond Commission.

(5) Determine the fees which shall be paid by students.

(6) Purchase land and purchase or construct buildings necessary for the use of the university system, subject to the approval of the Board of Regents and in accordance with applicable laws.

(7) Purchase equipment, properly maintain and make improvements to facilities necessary for the use of the university system, in accordance with applicable laws.

(8) Lease land or other property belonging to it or to any college or university within its system, in accordance with law.

(9) Sell, transfer or exchange land or other property not needed for university purposes, in accordance with law.

(10) Employ or approve the employment, fix or approve the salaries, and fix or approve the duties and functions of personnel for the board and the university system in accordance with the provisions of this Chapter.

(11) Formulate curricula and programs of study.

(12) Adopt, amend or repeal rules and regulations necessary or proper for the business of the board and for

the govenment of the colleges and universities comprising its system and for promoting their purposes.

(13) Adopt, amend or repeal rules and regulations for the government and discipline of students.

(14) Affiliate with any institution giving any special course of instruction, upon such terms as the board deems expedient, which terms may include the retention by such institution of the control of property, faculty and staff.

(15) Award certificates, confer degrees and issue diplomas certifying the same.

(16) Enter into contracts and agreement with other public agencies with respect to cooperative enterprises and undertakings relating to or associated with college or university purposes and programs, in accordance with applicable laws.

(17) Adopt academic calendars, which shall, among other things, make provision for an appropriate and reasonable number of days during which academic teaching personnel may, with necessary approval of appropriate university officials, be permitted to be absent from their duty posts; the time herein provided for shall be in lieu of annual leave granted unclassified state employees by R.S. 42:421. Provided, however, when an academic teaching employee covered by this Act retires, or whenever any such employee dies before retirement and while holding membership in any retirement system to which the state contributes in whole or in part, leaving a surviving spouse or dependent or both, who are entitled to benefits from the retirement system, the unused days shall be added to the employee's membership service in the same manner and to the same extent as if the employee had continued in state service until the time such number of unused days have elapsed, dating from the date of the employee's death.

(18) Perform such other functions as are necessary or incidental to the supervision and management of the university system it supervises and manages.

B. In addition to the powers and duties vested by Subsection A of this Section and any other applicable laws, each board, as soon as practicable, shall adopt:

(1) Bylaws setting forth the respective rights, duties and responsibilities of the board, the various administrative officers, and the faculty. These bylaws shall be specific in fixing responsibility and in describing lines of authority, without being so detailed as to encumber the machinery of government with undue formality. These bylaws may provide appropriate rules under which they may be amended from time to time.

(2) Rules and regulations which may provide for:

(a) A method of obtaining expression of faculty opinion when appointments are to be made to the offices of president, or head of a college or university, chief academic officer of a college or university, deans, directors, and heads or chairmen of departments.

(b) The establishment, award and continuance of fellowships, scholarships and all other forms of student aid. Such rules shall be so designed as to promote high standards of achievement and scholarship in the respective recipients and to insure the award and continuance of fellowships and scholarships solely upon the basis of merit, and other forms of student aid strictly upon the basis of necessity and merit.

(c) The administration of the various student loan funds and the granting and repayment of such loans.

(d) It shall be the further duty of the board to employ the proceeds of all donations, grants, sub-

scriptions and bequests to a university, or to any school, college or division, or in trust therefor, so as to effectuate the purposes and accord with the terms and conditions of such donations, grants, subscriptions and bequests.

(3) Policies and rules authorizing state colleges and universities to develop and conduct courses of study and curricula for inmates and personnel at state correctional institutions, pursuant to authorization by the Department of Public Safety and Corrections. The courses of study to be offered shall be developed by the college or university and approved by the governing board.

La. R.S. § 17:3352. Degrees

A. Each board shall confer degrees evidencing satisfactory completion of the principal courses of study and award diplomas in certification thereof at the colleges and universities under its jurisdiction. Each board may provide for the issuance of certificates to evidence satisfactory pursuance of studies not leading to a degree. Any board also may confer appropriate honorary degrees on any persons who have made substantial achievements in literary, artistic, scientific or technical fields of endeavor, but no degree, whether honorary or earned, shall be conferred except by vote of the board upon the recommendation of the president or chief administrative officer of the system, head of the college or university, and of the faculty of the appropriate college, school or division of a college or university.

B. All earned degrees and certificates conferred by each board shall be recognized by the courts and other officials of Louisiana as entitling the graduates holding such degrees to the same rights, privileges and immunities in the state of Louisiana as the diplomas, degrees or certificates of any other institution of learning.

La. R.S. § 17:3353. Cooperation with public agencies

A. Each board may enter into contracts and agreements with any public agency for the establishment of state or other public offices on the property and in the buildings of the university. It also can enter into contracts and agreements for joint construction, equipment, maintenance and financing of such buildings, and enter into contracts and agreements for the joint financing, supervision and conduct of cooperative enterprises and undertakings.

B. Any public agency is authorized to enter into contracts and agreements with any board for the purposes mentioned in this Section.

La. R.S. § 17:3354. Independent audit of financial transactions of a university system, college or university

A. Any board may from time to time cause to be made an independent audit of the financial transactions and accounts of its university system or of any college or university therein.

B. For the performance of an independent audit a board shall employ auditors who have no financial interest in the activities of its university system and who are under no contract of employment or retainer with the university system or any department or division of the state government for purposes other than independent audit. At least one responsible member of the auditing firm or group selected shall be qualified to practice as a certified public accountant.

C. Upon completion of an independent audit, a complete and detailed report of the findings and recommendations of the auditors shall be printed by the board and copies thereof transmitted to the governor and the legis-

lative auditor. The expense of the audit and report shall be borne by the university system out of appropriations.

D. Nothing herein contained shall be construed to eliminate the necessity of an audit required by law to be made by any public auditing agency.

La. R.S. § 17:3355. Contracts and purchases; livestock shows and rodeos; food services

A. All purchases, contracts and other business transactions shall be made on terms most favorable to the college or university for which the purchase is made, the contract is executed or to which the business transaction relates. All purchases made and contracts executed shall conform to applicable state laws relating to competitive bidding and the letting of contracts. The purchasing agent of each college and university shall be a deputy purchasing agent of the state central purchasing agency.

B. Notwithstanding the provisions of Subsection A of this Section, each board is hereby authorized and directed to advertise for bids, and to award to the lowest bidder, to contract for the h[illegible]g and conducting of livestock shows and rodeos.

C. Notwithstanding any other law to the contrary, the management board of any state college or university may after advertisement for and receipt of bids, contract with the lowest responsible bidder for food services, vending operations, and similar other services for a term not to exceed three years. Such a contract may include an option to renew the contract on a year to year basis, not to exceed a period of three years. No increase in a renewal contract price shall exceed the percentage of increase in the consumer's wholesale price index since the previous contract was entered. Such contracts, or renewals of contracts, shall also be approved by the state Division of Administration.

La. R.S. § 17:3356. Official action of boards; vote required

Notwithstanding any other provision of law to the contrary, all official actions of each board shall require the favorable vote of nine members.

PART VII. LEASES OF COLLEGE AND UNIVERSITY PROPERTIES

SUBPART A. LEASES TO ORGANIZATIONS

La. R.S. § 17:3361. Authority of boards to execute leases

A. Each board may grant leases of any portion or portions of the grounds or campus of any college or university or of other immovable property under its supervision and management, for a term not to exceed ninety-nine years for each lease, to any of the following:

(1) An organized national or local college or university fraternity or sorority.

(2) A religious, quasi-religious or benevolent organization or other nonprofit corporation or association.

(3) A military organization under the supervision of the state of Louisiana or of the United States of America.

(4) A public body.

(5) A private entity, provided such private entity shall be obligated under the terms of the lease agreement to construct improvements on the leased premises which will further the educational, scientific, research or public service functions of the board.

B. Each board may permit the lessees to erect, construct, and maintain thereon fraternity or sorority houses or homes, student centers, facilities for religious worship and instruction, armories, storehouses, and other structures. Contracts entered into by a private lessee for the

performance of work on the leased premises or the erection, construction, or maintenance of improvements on the leased premises shall not constitute public works contracts.

C. The land leased to any fraternity, sorority, religious or quasi-religious organization shall not exceed one acre.

D. The architectural plans for each house or other structure shall be approved by the board prior to construction on the leased grounds.

E. The provisions of R.S. 39:1643 and Part I of Chapter 10 of Title 41 of the Louisiana Revised Statutes of 1950 shall not be applicable to agreements authorized by this Part.

La. R.S. § 17:3362. Rules and regulations governing construction and maintenance of structures

A. Unless waived by written consent of the board, each board, before granting any lease or leases under the provisions of this Subpart, shall, either directly or through the head of the college or university, formulate and adopt such rules, regulations and requirements as it deems necessary or desirable, relative to the erection, construction and maintenance of fraternity or sorority houses, student centers, armories, storehouses or other structures. Any such rules, regulations and requirements shall be incoporated into the contract of lease as a condition precedent to the validity thereof.

B. Unless waived by written consent of the board, there shall be reserved to the board, whether or not stipulated in the lease, the right to require the removal of any fraternity or sorority house, student center, armory, storehouse or other structure erected under the provisions of this Subpart, in the event that the lessee fails, neglects or refuses to comply with the rules, regulations or requirements.

La. R.S. § 17:3364. Rules governing conduct and social activities of people in structures

Each board, either directly or through the president of the college or university, may adopt such rules or regulations as it deems necessary or desirable relative to the conduct and social activities of people in the houses or other structures erected on the leased grounds under the provisions of this Subpart and may amend these rules and regulations in such manner as is deemed to be in the best interest of the college or university. Unless waived by written consent of the board, failure of any lessee to conform to the rules and regulations shall be cause for the immediate termination of the lease and removal of the houses and structures at the option of the board, and the board shall be the sole judge of the rules and of conformity or nonconformity thereto.

La. R.S. § 17:3365. Transfer of lease; sublease; mortgage on structure and lease

A. With the prior written consent and approval of the board, all or any portion of the property or the improvement constructed thereon may be assigned or subleased under such terms and conditions as authorized by the board. The board may lease back all or any portion of the property or the improvements constructed thereon under such terms and conditions as authorized by the board. The term of any assignment, sublease or lease-back may equal but not exceed the term of the original lease.

B. Lessees may grant mortgages on the improvements erected on the leased premises and on the lease, but all such mortgages, as well as the rights of the mortgagees, shall be subject to the rules and regulations and to all the provisions of this Part.

La. R.S. § 17:3366. Assistance to college or university sponsored organizations in construction or maintenance of house

Each board may assist any college or university sponsored organization under the supervision of said college or university in the erection, construction or maintenance of facilities on the grounds of the university by unconditionally endorsing or guaranteeing any loan heretofore or hereafter made by any person for such purpose, and in such a manner, for such terms, and on such conditions as the board deems advisable. No such loan shall be so endorsed or guaranteed until the amount, terms and conditions of the loan have been approved by the State Bond Commission; however, this requirement shall not apply to loans endorsed or guaranteeed prior to the effective date of this Subpart, or to renewals of such loans.

SUBPART B. MINERAL LEASES

La. R.S. § 17:3367. Authority to execute mineral leases on college and university lands; term; use of revenues

A. Each board is authorized to execute and fix the terms and conditions of oil, gas and mineral leases upon any lands owned in whole or in part by the board or held by it for the use and benefit of any college or university under its supervision and management for the purpose of exploration, development, drilling and mining for oil, gas and other minerals in accordance with the provisions of Article IX, Sections 4 and 5 of the 1974 Constitution of the state of Louisiana.

B. Each lease sought to be executed under authority of this Section shall require the prior approval of the State Mineral Board.

C. Revenues from oil, gas, and mineral leases executed by each board as authorized in Subsection A of Section 3367, shall be allocated to the board which executed the lease, or its successor, and shall be used by the recipient board solely for the benefit of the college or university located on the leased properties. As to each such college or university, these revenues shall be in addition to any other revenues or funds appropriated or otherwise provided for or available to the college or university, and in no case shall any of these revenues be computed or considered by the Division of Administration or otherwise in determining the amounts to be appropriated to or for the college or university in the general appropriation act or any other act, and in no case shall these revenues, or any part of them, be computed or considered in determination of the allocation of funds under the Board of Regents appropriation formula for higher education.

The revenues received under this Subsection for a college or university first shall be used to alleviate safety hazards and other bona fide emergency conditions and make needed major repairs to buildings, grounds, streets, parking lots, purchase of land and upgrade utility systems of that institution and thereafter may be budgeted and used for new capital construction or capital acquisitions.

Capital projects costing one hundred thousand dollars or more shall be included in a capital outlay budget for submission to and action by the legislature.

In order to insure that the highest priority shall be given to the projects aimed at preserving and improving existing facilities, the Board of Regents shall recommend priorities for emergencies and major repairs required on the college and university campuses.

PART VIII. STUDENT AID

La. R.S. § 17:3371. Student loan funds

A. The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College is the official custodian and responsible for the administration of the diamond jubilee loan fund.

B. Each board is the official custodian and responsible for the administration of all funds created and held in trust for the purpose of making loans to needy students at any of the colleges and universities under its supervision and management. It shall have full power to sue for the recovery of any unpaid loans made from such funds.

PART IX. MISCELLANEOUS PROVISIONS

La. R.S. § 17:3381. Transportation for college students; parish school boards' authority to provide

The school boards of the several parishes may enter into contracts with individuals, partnerships or corporations domiciled in this state to furnish transportation at no cost to students attending any university, college or junior college under the supervision and management of the Board of Trustees for State Colleges and Universities, the Board of Supervisors of the Louisiana State University and Agricultural and Mechanical College or the Board of Supervisors of Southern University and Agricultural and Mechanical College, or may furnish such free transportation themselves, and pay for the same in the manner provided for defraying other expenses.

A. A city or parish school board may enter into contracts with individuals, partnerships, or corporations domiciled in this state to furnish transportation to students attending any university, college, or junior college under the supervision and management of the Board of Trustees for State Colleges and Universities, the Board

of Supervisors of the Louisiana State University and Agricultural and Mechanical College, or may furnish such transportation themselves, and pay for the same in the manner provided for defraying other expenses. Students receiving transportation may be charged a bus transportation fee in an amount not to exceed the actual cost of providing the transportation service. A school board shall establish such fees and shall provide for their collection.

B. A city or parish school board may adopt rules and regulations in accordance with this Section under which students other than qualified college students, such as exceptional or vocational-technical students, may be transported. However, the provision of transportation to such other students shall not result in the denial of transportation to an otherwise qualified college student nor result in the increase of the direct cost of buses and salaries and expenses of bus operators incurred by the school board in providing such transportation. Students receiving transportation may be charged a bus transportation fee in an amount sufficient to completely offset the actual cost of providing the transportation service. A school board shall establish such fees and shall provide for their collection.

La. R.S. § 17:3382. Teacher certification programs in instruction of elementary school French

A. The Board of Trustees for State Colleges and Universities, the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College and the Board of Supervisors of Southern University and Agricultural and Mechanical College are hereby required to direct institutions under their control which presently offer teacher certification programs in the instruction of high school French, to similarly offer teacher certification programs in the instruction of elementary school French.

B. The provisions of Subsection (A) shall not be construed to prevent an institution from offering teacher

certification in elementary school French even though said institution lacks a teacher certification program in high school French.

La. R.S. § 17:3383. State colleges and universities; capital outlay budget, exemption

Minor repairs or construction of buildings or other facilities costing less than one hundred fifty thousand dollars may be undertaken by or on the campus of a state college or university without being included in the capital outlay budget but shall be subject to the approval of the Board of Regents and the appropriate management board.

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with a advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Rule 65. Preliminary Injunction.

* * * *

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF LOUISIANA, *et al.*,
Defendants.

UNITED STATES' OBJECTIONS TO THE SPECIAL MASTER'S FINAL REPORT AND ORDER, ISSUED ON MAY 26, 1989

I. INTRODUCTION

On April 18, 1989, Special Master Paul Verkuil issued his Recommended Remedial Plan and requested that each party submit its response and any proposed amendments by April 30, 1989. The United States filed a response which, in general, stated that the proposed remedial Plan was constitutionally insufficient—because it was not a plan that "promises realistically to work, and promises realistically to work now".[1] Our response also suggested amendments which we believe would cure some of the deficiencies in the proposed plan. On May 26, 1989, the Special Master issued his Final Report, which mirrors, in most respects, the earlier proposed remedial plan. Thus, the United States continues to believe that the Special Master's proposed plan is constitutionally deficient and therefore should not be approved by this Court.

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[1] *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 439 (1968) (emphasis in original).

One fundamental—and we think fatal—deficiency in the Special Master's plan is that it is in most respects nothing more than a general outline for a yet to be established new single board to use as a guide in developing a final plan. Since the single board must be established, must organize, and then must develop a final desegregation plan, while simultaneously learning and carrying out all of the other duties a governing board must normally perform, the United States has little optimism that there will anytime soon be an actual detailed plan for this Court and the plaintiff parties "to assess the effectiveness of [the] plan in achieving desegregation." This Court and the plaintiffs will therefore be delayed in "having a plan which promises meaningful and immediate progress toward disestablishing state-imposed segregation." *Green* v. *New Kent County Board of Education*, 391 at 439.

In our view, having the special Master propose a plan which leaves a number of critical issues unresolved is not consistent with the role which we believe the Special Master was appointed to serve. Indeed, we believe that it is the development of detailed final plan "function" which the Special Master was appointed to perform and that this was the contribution to this case he needed to perform. The Special Master has a familiarity with the witness testimony and expertise that makes it easier for him to undertake this task than the Court (which, after all, could have drawn up an outline on its own), and the Special Master has an objecctivity and constitutional duty which will distinguish it from any new board, however distinguished. Moreover, without clear, particularized requirements, we fear this lawsuit will drag on literally into the next century. This will disserve the mandated aim of immediate desegregation and will also postpone the day when the administration of the State's higher education system will be the business of the State's educators—not its lawyers, the United States' lawyers, and this Court. The United States hopes that day would

be achieved no more than five years from now, but that will be impossible if a detailed plan is not adopted immediately. Assuming, for example, that a new board would take five months to complete a detail final plan, and assuming an expedited review by the parties and this Court to determine whether the plan is constitutional, it will take a minimum of six months before the plan could be implemented. Of course, if further litigation ensues when a final plan is proposed by the new single board, then there will be even greater delay in implementing a final plan. Thus, the need to have a final, court-approved plan *now* is clear. Appendix A shows in chart format the issues which were resolved and those which have been deferred until a later date. As the chart reveals, more issues were deferred than resolved.

Because, as stated above, the Special Master's Final Plan differed little from his draft proposal, we incorporate by reference our earlier Response (attached). We will dwell in this filing primarily on those parts of plan that were changed.[2]

II. DISCUSSION

A. The Proposed Plan Must Be Rejected Because It Lacks Specificity In A Number Of Critical Areas And Therefore Leaves Key Issues Unresolved

1. In light of the long and protracted history of this case, there is simply no justification at this late date for the Court and the plaintiffs to have before them merely a general outline, which obviously needs substantial further work and "filling-in." No one can reasonably argue that this is a plan that can be evaluated by the Court and plaintiffs to determine whether the proposed plan

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[2] Concerns which we raised in our original Response that the Special Master has satisfactorily addressed include: e.g., use of ACT scores.

"promises meaningful and immediate desegregation progress toward disestablishing state-imposed segregation."

The state defendants certainly have had sufficient time to develop and propose a constitutionally acceptable plan, but have failed to do so. A brief look at the history of this case shows the State's consistent refusal to submit an acceptable plan. This litigation originated from a determination by the Department of Health, Education and Welfare (HEW) in 1969 that the State of Louisiana was operating a system of public higher education that was not in compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. Pursuant to a referral from HEW, the Attorney General initiated suit against the State in 1974, and following extensive discovery the parties entered into a consent decree in 1981. During the six-year period between September 1981 to December 1987, the State failed fully to implement this decree, and in August 1988 this Court determined that the State had failed to achieve the desired goal of eradicating all vestiges of Louisiana's former racially dual system of higher education. The parties engaged in extensive settlement negotiations—which included active participation by the Governor—between October 1987 and March 1989, but these efforts were unsuccessful. After the Court issued its Order and Reasons on August 12, 1988, both the Court and the Special Master provided the state defendants several opportunities to submit a constitutionally acceptable plan. The state defendants submitted an incomplete plan with no commitment to implementing specific desegregation proposals. Between August 1988 and March 1989, the parties again engaged in extensive settlement discussions simultaneously with preparation for a remedial trial. Much was discussed and many meetings were held, but no final agreement was ever reached because the plaintiffs and defendants disagreed on a number of fundamental issues. Moreover, the day before the remedial trial was due to start, the parties again engaged in settle-

ment discussions, which included Governor Roemer serving as the principal negotiator for the state defendants. In spite of an apparent agreement on the difficult issues which separated the parties in past discussions, the state defendants on the eve of trial reneged on their commitments.

This history makes clear the state defendants have had several opportunities to develop a plan during the past eighteen months—indeed, the past fifteen years—and have consistently failed to do so. Thus, it was the state's failure to meet its constitutional duty to submit an acceptable plan and the parties inability to reach a negotiated plan that lead to the appointment of a special master. We believe it is this history showing the state's failure to meet its obligation which dictates against the Special Master delegating to the state defendants a further opportunity to develop an adequate plan.

2. The Final Report clearly shows that a number of issues—indeed many of the very issues over which the parties have vehemently disagreed—remain unresolved and therefore makes the plan incomplete. There is nothing in the record in this case which would lead this Court or any party to believe that a yet-to-be established single board will have any greater success in resolving these issues. Thus, if the plan proposed by the Special Master is approved, it will leave for a future time resolution of obvious disagreements among the parties. A few examples will illustrate this latter point.

Program Duplication. One of the issues over which there has been great discussion and strong disagreement is the proper approach to address program duplication as between the two institutions in Baton Rouge—Southern University (historically black) and Louisiana State University (historically white). Louisiana State University has indicated a willingness to engage in cooperative programs to address program duplication. Southern Univer-

sity has indicated a willingness to consider cooperative programs, reassigning programs between the two institutions, and assigning some programs exclusively to each institution. But because of this difference in philosophy and difference of views on what the law requires as to which technique should be used, the two institutions have never been able to agree on anything specific in this area. When the Governor appointed his Task Force, which was responsible for recommending a plan, the Governor and his Task Force could not develop final recommendations in this area. Indeed, the Task Force, which consisted of a distinguished group of educators, citizens and business people, "punted" the issue to another body—a suggested single board. It should be noted that each member of the Task Force was appointed by the Governor and no doubt understood the issues in this case and the need for final resolution. The Task Force was unable to develop a complete and final plan.

The Special Master's plan does not resolve the dispute as to how to address program duplication in Baton Rouge. In spite of the Special Master's finding that the "evidence in this case demonstrates that there is more duplication in Louisiana than is desirable from the point of educational efficiency" and his noting of the testimony of different witnesses as to how best to address program duplication (Final Report at pp. 93-95), the Special Master did not weigh the testimony of these witnesses and the factual record and determine which techniques would be effective in addressing duplication. Instead, he delegated to the single board "as one of its first missions the reduction of duplicated programs, especially where they involve proximate institutions." (Final Report at p. 95)

The difficult issue which must be resolved is: What is the legally appropriate technique for addressing program duplication in Baton Rouge? It was not resolved by the Special Master, and the single board, once it is established, can only recommend an approach—which will

be subject to review and comment by plaintiffs and review and approval by this Court.

Funding. The funding question is another issue over which the parties have had major disagreements, and which the Special Master failed to resolve. We believe that the Special Master was correct in determining that enhancement funding is necessary, but object to the fact that his Final Report contains no details on specific funding required by Grambling and Southern.

In his Final Report, the Special Master responds to the objection of the United States and of other parties regarding his failure to make specific findings on enhancement funding. He responds to those objections by concluding that the record "simply lacks the details and specifics necessary to make final determinations about enhancement dollars". (Final Report at p. 104, n. 32) Nevertheless, we believe that the Special Master was well aware of the disagreement among the parties regarding funding, and because of such disagreements it is reasonable to conclude that they will not "go away" by leaving them to be resolved by a single board. There are two specific failures by the Special Master in this regard. First, there is a fundamental disagreement between the plaintiffs and historically black institutions versus the other defendants over the issue of whether enhancement funding is necessary, and if it is, what is meant by enhancement funding. The Special Master resolved the first part of the issue—in determining that such funding is necessary—but he failed to address the equally important question of the specific amount of enhancement funding that is necessary to eliminate unconstitutional vestiges. Second, the Special Master could have set criteria and recommended a specific process for determining the level of funding—as suggested by the United States in its proposed plan—rather than leave this issue to be resolved by the defendants who heretofore have strongly disagreed with providing such funding, have been unwilling to com-

promise on this issue, and failed to fulfill their obligations, in this area, under the consent decree.

In sum, we believe that program duplication and enhancement funding involve legal issues which should have been resolved fully by the Special Master and said issues should not be left for a lay board to resolve.

B. The Special Master's Finding That A Single Board Is Warranted And Will Promote Desegregation Of The System Is Not Supported By The Record

1. While correctly acknowledging that the single board is not a panacea to desegregation, the plan treats it as one by not only embracing the scheme but exalting the single board as its centerpiece. Most troubling is the fact that all decisions concerning other provisions of the plan are held in abeyance pending the establishment of the single board. (Final Report, pp. 62-110.) There is no compelling reason for such a delay in implementation of a plan. This delay is not only inconsistent with the Court's directive concerning plan development, but also ensures that there will be no specific final plan until the single board completes its evaluation process, thus placing the parties and the Court in the same positions in which they stood in November 1988—reviewing and evaluating the desegregation proposal filed by the parties. In view of the fact that there have been serious disagreements among the State, the two predominantly black institutions, and the United States, it is unreasonable to expect that the single board will develop and offer specific proposals that will be acceptable to all parties. Consequently, the vaguness of the Final Report—and delegation to the new board of the hard decisions that must be made—ensure that further litigation will occur.

We remain skeptical that the record in this case can support the finding that a single board is warranted or that it will enhance desegregation. In all events, we adhere to our position that we do not object to the creation

of a single board if the Master and the Court conclude that the multi-board system is a vestige of past discrimination or that it is impeding successful desegregation. Without one or the other findings, the Court lacks the power to require a restructuring of the governance system within Louisiana.[3] Our position remains that a single board can be an appropriate *part* of a comprehensive desegregation plan. What is not acceptable is the Final Report's proposal that the single board be given the carte blanche discretion to resolve numerous key issues and therefore, in effect, to prepare the comprehensive desegregation plan itself.

The presumption that the creation of such a board is itself sufficient to ensure elimination of the vestiges of segregation of Louisiana's higher education system is without support in the record of this case and is without factual corroboration in the annals of higher education

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[3] This Court in its August 2, 1988 Order and Reasons (at p. 6) found that the four governing boards were racially identifiable, but apparently did not find that the present governance *structure* was violative of the Constitution. The racial identifiability of the governing boards could of course be eliminated without eliminating the governance boards. The Supreme Court has held that desegregation orders cannot exceed "fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities. That is not plenary." *Hills* v. *Gautreaux*, 425 U.S. 284, 293 (1976). The judicial power contains the "inherent limitation" that "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation . . ." *Milliken* v. *Bradley*, 433 U.S. 267 (1977). The remedy must be tailored to cure the condition that offends the Constitution. *Ibid.* See also *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419-420 (1977); *Austin Independence School District* v. *United States*, 429 U.S. 990, 991 (1976) (Powell, J., concurring). In the circumstances extant here, the 1974 Louisiana Constitution reserves to the state senate and the people of Louisiana the authority to restructure higher education governance; an order requiring the proposed conversion would conflict with the State's constitutional provisions.

desegregation. The grounds cited for support of the proposal to establish the single board do not survive close scrutiny.

First, it is suggested that a single board is likely to be more efficient than the current governance structure and may lead, therefore, to reducing the extensive program duplications and "freeing up" of funds to aid in the desegregation process. References to efficiency are of course appealing, especially when the State seems to be short of money, but there is little reason to hope that the single board will lead to substantial economies. On the other hand, if such economies are realized there has been no commitment on the part of the State to utilize those economies to support the higher education desegregation process. Nor is there evidence that single board states *per se* are any more successful that multi-board states in reducing the program duplication that perpetuates segregation. There is, in particular, nothing in the record of this case indicating that any state has employed the single board concept as a means of remedying a constitutional violation.

Second, it is suggested that "factionalism and rivalries produced by the present organizational structure make it difficult to concentrate attention upon goals of either desegregation or efficiency", and it is implied that the single board structure will somehow not be susceptible to such pressures. Again, however, there is no basis for such an implication. See Testimony of Governor Roemer (Feb. 23, 1989 deposition), at page 85 line 10—page 88 line 4; Testimony of Dr. Kerry Davidson (Feb. 10, 1989 deposition), at page 97 line 24—page 99 line 12; *id.* at page 102 line 9—page 103 line 19; *id.* at page 109 line 23—page 110 line 5.

Finally, it is suggested that "The strongest argument of those favoring the present multi-board solution is that structure of higher education in Louisiana is irrelevant

to the goals of desegregation and therefore it ought not be changed. This is not an easy proposition to sustain." (Final Report at p. 48). But the position of the United States is simply that there are no compelling reasons nor is there any evidence to suggest that a single board structure is necessarily superior to a multi-board or decentralized governance structure in advancing desegreation—and that therefore the creation of single board does not diminish the need for the other necessary specifics of a desegregation plan. The record, including the testimony of each witness supporting the single board structure, is devoid of any factual evidence in which a single board has been established as a mechanism to advance higher education desegregation. Thus, for example, the Special Master recognized that Dr. McTarnaghan's testimony on the benefits of a single board related "more to efficiency than the question of desegregation" (Final Report's p. 49).

In sum, while a single board may be acceptable as a part of an overall desegregation plan, that plan must include much more, for a single board in itself will not ensure effective desegregation.

2. Even if the Special Master had made the proper finding to justify a single board as the appropriate desegregation approach, he should have allowed no delay in the appointment of the board. Under his draft recommended remedial plan, the Special Master allowed the Governor several months to appoint a board and gave the Governor additional time if he merely showed that such time was needed. Such an approach is clearly inconsistent with longstanding case law which requires that vestiges of segregation be eliminated "root and branch" and "*now*". Apparently in response to objections by the United States and Southern University, the Final Report acknowledges the Governor's commitment to nominate persons for the board within seven (7) days from the date the Court approves a final plan, though it allows thirty days (30)

to put the board in place and provides that the Court may appoint an interim board if the state defendants fail to act timely. Here again, however, the Special Master fails to realize that the primary reason why he should have appointed an interim board is because of the clear pattern of the state defendants' failures to act and failures to take adequate steps. Indeed, it was this very pattern which required that this Court to appoint a Special Master, and it was this very pattern that has caused this litigation to last more than fifteen years. In spite of this pattern of failing to act and strong opposition by the United States and Southern University, the Special Master failed to adopt a specific recommendation that would have allowed him to resolve this issue—that is, our recommendation that he immediately appoint an experienced interim board.

C. The Special Master's Recommendation to Appoint Ten White and Seven Blacks To The Single Board Fails To Ensure a Desegregated Body Which Will Correct What the State Has Failed To Do In Fifteen Years

The Special Master is incorrect in concluding that no party has proposed or suggested any race-neutral criteria that could ensure the protection of black interests as effectively as mandating a substantial black membership on the board. The United States recommended a process which the Special Master rejected for no reason other than the defendants' objection to it. In our previous response, we suggested that the Special Master appoint an interim single board from the members of the current four boards. Since the current boards include both black and white members who have been confirmed by the legislature, this process would have allowed the Special Master to constitute a desegregated board. Equally important, this process would have allowed him to select persons whom he believed "have the background, experience and

commitment to make the plan for racial integration work, wherever they are from." (Final Report, at pp. 55-56.) This process, as discussed above, would have also eliminated the need for the Governor and the legislature to adhere to an unreasonable timetable in putting the single board in place.

D. Issues Requiring Resolution Now

1. *Articulation Agreements*

The Special Master concluded that "the transfer function of community colleges must be emphasized". (Final Report, at p. 85.) The Master then concluded that drawn articulation agreements must exist between community colleges and four-year institutions to ensure that the transfer possibilities become a reality. It is the task of the new system to establish these agreements. But there is no logical reason why the current staff of the Board of Regents, Board of Trustees and appropriate officials of Southern University and Louisiana State University cannot develop articulation agreements *now*. Indeed, the record shows that the defendants relied upon Dr. James A. Caillier, President of Delgado Community College—the only desegregated institution in the Louisiana system—to demonstrate the need for a community college system, and Dr. Caillier agreed that there is a need for a transfer function as between community college and four-year institutions. (Final Report, pp. 81-85.) The Master relied upon Dr. Caillier in finding that the transfer function would be a necessity to foster desegregation of four-year institutions. Having relied upon Dr. Caillier and other experts knowledgeable of community colleges, and inasmuch as there are defendant officials who have expertise in operating community colleges, there is simply no justification for not requiring articulation agreements immediately—rather than asking a future board, which no doubt will have a partial or wholly new staff, to undertake this responsibility. This issue could have been *re-*

solved and the articulation agreements could *now* be before the Court and the parties for review in terms of their desegregation effectiveness. Instead, the Court and the parties must wait.

2. *Duplication Remedy—Program Transfer*

Most persons involved in this case would probably agree that the three most controversial and difficult issues in this case are: whether a single board should be appointed; whether enhancement funding should go to the historically black institutions and, if so, how much; and what are the effective means of remedying program duplication. The first two issues have been discussed above and those discussions will not be repeated here.

With respect to program duplication—an issue which has been debated greatly by the parties in this case and an issue upon which the army of experts in this case have disagreed—the Special Master concluded: "It is difficult on the evidence presented to conclude with confidence that program transfer will work. However, it is clear that duplication of programs can have a stultifying effect on desegregation. Therefore, it is imperative that the [new] board take as one of its first missions the reduction of duplicated programs, especially where they involve proximate institutions." (Final Report at p. 95).

It is clear that once again the Special Master did not resolve the difficult and controversial issue. Indeed, if the Court adopts the Special Master's recommendation concerning this issue, there will have been no progress made in resolving this issue during the past eighteen months—in spite of the fact that an independent person, the Special Master, was specifically appointed to resolve such issues. Having had assistance from many experts and numerous defendant officials from both historically white and black institutions, the fact that the Special Master made no specific findings in this area leaves the new board without specific guidance in resolving this issue.

Thus, it is reasonable to conclude that the new board will rerun the process—obtain the advice of defendant officials and still more experts. If the new board decides that program transfers should not be used, further litigation will no doubt ensue. And if the new board decides that program transfers *should* be used, it is reasonable —in light of the defendants (excluding Southern University, Grambling and Louisiana Tech, and Board of Trustees) stated to opposition to program transfer—to conclude that there will also be further litigation. Indeed, if the new board reflects the views of Louisiana State University-Baton Rouge (the designated flagship school) and the Governor—which is not unlikely, since the Governor will appoint the member of the new board—the new board *will* adopt a position in opposition to program transfer. Again, we think that failure to resolve the program transfer *now* can only ensure further litigation.

3. *Legal Education*

The Special Master found that Louisiana State University has failed to take adequate steps to desegregate its law schools. He also found that the two state-supported law schools continue to exist side-by-side in Baton Rouge and that LSU's Law School continues to be racially identifiable. The only remedial measures recommended by the Special Master, however, are: (1) than a ten percent (10%) goal of black enrollment be established for Louisiana (LSU); (2) that LSU offer substantial scholarships to blacks and undertake vigorous recruitment efforts aimed at black students; (3) that cooperative agreements be established; and (4) and that certain other measures be taken at some future time if LSU's black enrollment does not increase.

In light of the findings of the Special Master, there is no reason why specific measures—*e.g.*, a detailed student recruitment and affirmative action plan—were not required by the Special Master. If this had been done,

then the Court and the plaintiff could evaluate the effectiveness of such a plan. As it stands now, however, we must wait for a future date to see what specific steps will be recommended to desegregate the legal education programs.

4. *Lincoln Parish*

We are pleased that three of the defendants in this case—Louisiana Tech, Grambling, and the Board of Trustees—were able to overcome controversy and differences and therefore were able to reach an amicable resolution of program transfer issues. We are also pleased that the Special Master endorsed the Stipulation reached between Grambling and Louisiana Tech. There is one major problem, however, that the Special Master did not resolve and which will no doubt impede the effective implementation of the Stipulation. Grambling's ability to attract other-race students and to offer programs which will help it achieve this objective, as well as its ability to eliminate unconstitutional conditions related to its facilities and physical appearance, depend upon receiving enhancement funds. Yet, as discussed above, the Special Master's Final Report did not resolve this issue. Because the two institutions were able to reach the Stipulation, and because it presents a specific plan, we believe it was especially important for the Special Master to determine the funding necessary to implement the Stipulation. He did not and therefore final resolution of this part of the case will be delayed until a future day.

E. The Final Report Contains No Specific Provisions Showing How Other-Race Students, Faculty And Administrators Will Be Increased

In each proposed plan and pleading filed by the United States, we have urged the Court and the Special Master to require the defendant institution and governing boards to develop detailed recruitment plans for other-race stu-

dents, faculty, and administrators. We believe that the Special Master was correct in finding that there is a need for such plans. We object to the fact, however, that the Special Master did not require that detailed recruitment of plans be presented *now* so that they can be evaluated by the Court and plaintiffs for their desegregation effectiveness. Again, such a review must await a future date.

III. CONCLUSION

For the reasons set forth above the United States request that this Court reject the Special Master's Final Report and Proposed Order.

Respectfully submitted,

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Institutional Effectiveness in the Production of Black Baccalaureates

by

Philip S. Hart
College of Public and Community Service
University of Massachusetts—Boston

A Report of Research Completed Under
A Grant From The
Southern Education Foundation
Atlanta, Georgia

1984

Chapter 1

INTRODUCTION

Historically, black colleges and universities have played a critical role in the undergraduate education of black Americans. The majority of these institutions, founded after the Civil War, were for nearly a century the only choice black students had who were interested in a college education. The civil rights movement of the 1960's and the subsequent federal legislation served to open the doors of predominantly white institutions to blacks—in a large number of cases for the first time—and many of them were recruited eagerly. As predominantly white institutions became accessible to black students in the late 1960's, the predominantly black institutions began to experience surges in enrollment that lasted for nearly a decade. This rise of interest in black undergraduates created widening opportunities for them to earn a baccalaureate degree.

But now, officials of many private black colleges say enrollments are slipping and there is serious concern about the future. To an extent, this enrollment slippage is a problem for public black colleges also. Black enrollment at predominantly white institutions has also peaked and fallen off. However, even though the number of black students attending college has more than tripled in the last twenty years, to about 1.3 million, the percentage at black colleges has declined from 82 percent in 1965 to around 28 percent in 1981.

FOREWORD

The Southern Education Foundation and the family philanthropies which preceded it have had a special and continuing interest in the education of black Americans for more than a hundred years. The Foundation has been concerned particularly with programs aimed at increasing and improving higher education opportunities for blacks in the South.

In April, 1974, the SEF Board of Directors established a special project, the Higher Education Program, to address issues which were surfacing as a result of the then *Adams* v. *Richardson* case. Under this higher education component, the Foundation supported coalitions formed by citizens to monitor state desegregation plans, sponsored conferences and workshops, published papers, monographs and documents, and awarded general grants which focused specifically on achieving equity in higher education in the ten states affected by the *Adams* case.

In September, 1978, the Higher Education Program proposed concentrating a major portion of its allocation on a Research Task Force which was formed to plan a research agenda for the Foundation and to commission research projects. This body of six educators has commissioned over 20 studies since its inception; this document is presented as part of the Higher Education Program Research Series. Other publications which are part of the series are listed at the end of this report and are available to the public for $5.00 each.

SEF has been able to expand its Higher Education Program as a result of receiving a grant in July, 1983 from the Ford Foundation; the publication of this report is made possible by the grant.

A list of other Foundation publications may be obtained by writing to the Southern Education Foundation.

Thank you.

SOUTHERN EDUCATION FOUNDATION
811 Cypress Street, N.E.
Atlanta, Georgia 30308
(404) 881-0875

May, 1984

Price: $5.00

[Table of Contents and List of Tables
Omitted in Printing]

Of the 105 predominantly black colleges, about half are members of state university systems. Approximately 95 percent of these 105 institutions are in southern or border states. Non-black students at black private colleges make up about one percent of total enrollment, a ratio that has remained about the same over the past two decades. Non-black students are more in evidence at black public colleges.

From a financial standpoint, black public institutions seem to be in better condition than black private institutions. Also, they seem to be more successful in expanding their pool of students, principally by enrolling a greater ratio of white students. Traditionally white institutions have also expanded their pool of students by including blacks, particularly at public institutions.

But there has been an overall decline in the traditional 18-22 year old age cohort for all races as the post World War II baby boom group moves into their mid-to-late thirties. Thus, if only for economic reasons, institutions are looking to alternatives. As in the late sixties and seventies when the keynote was heavy recruitment of blacks and women, now the key is different age cohorts. Thus, a crisis is now being felt as institutions scramble for students within a situation of open access and institutional survival becomes partially contingent upon recruiting an undergraduate student population which is age 22 or older.

The overall trends suggest a difficult time for all undergraduate institutions, black institutions in particular, with private black colleges being the most heavily affected. Undergraduate institutions face concerns related to institutional change and institutional survival. As a consequence, black undergraduate students today must face a situation that includes declining enrollments, a reduction in financial aid programs, a reduction in student support services, a decrease in the size of the faculty,

a decrease in library volumes, and a real concern about educational quality.

At the institutional level, the concern is thus two-fold. On the one hand, how can policies be developed which help preserve the traditional black institutions within a social, political, and economic climate which puts them on the defensive. On the other hand, how can the successful models of educating black undergraduates be transferred to predominantly white institutions that are now serving large numbers of black students. An important concern in this regard is whether traditionally black institutions can be preserved in the process.

Black undergraduates have traditionally been concentrated in the fields of education, the social sciences, humanities, home economics, and physical education, and they have been less in evidence in business, engineering, physical sciences and the biological sciences. However, there was an increased interest in business careers by black undergraduates in 1972. There have been efforts in recent years to recruit more black undergraduates into the areas they traditionally have been underrepresented. In addition, contemporary and projected socioeconomic conditions have made more black students alert to the value of moving into the fields of business, engineering and the physical and biological sciences.

There is ample evidence (Claffey, 1981; Brazziel and Brazziel, 1980) that traditionally black colleges and universities have been more effective than their white counterparts in moving students through to the baccalaureate degree. It is the black colleges that have graduated 75 percent of all black Ph.D.'s, 75 percent of all black army officers, 80 percent of all black federal judges, and 85 percent of all black doctors (Jordan, 1975). Ambition and determination to succeed continue to be evident at the undergraduate level whereby nearly two-thirds of the men and more than two-thirds of the women who entered black colleges in 1972 planned to continue beyond

the bachelor's degree. In all colleges, somewhat over half of the men and only 43 percent of the women planned graduate work.

There are undoubtedly specific reasons why these institutions have done a consistently effective job of producing graduates. Some have attributed this effectiveness to the "philosophy of education" in evidence at traditionally black institutions. Following Blackwell (1981), reasons which can be seen as important in recruiting, retaining, and graduating black professionals include, numbers of black faculty, quality of financial aid, special admissions programs, retention programs, proportion of blacks in the state population. type of institution, black college in the state, litigation status and number of professional schools in the state. Many of these factors are undoubtedly important in recruiting, retaining, and graduating blacks with bachelor's degrees.

The intent of this study is to identify those factors which are most important to institutional effectiveness in the production of black baccalaureates. Some of these factors are quantitative, while others are more qualitative in nature.

An 'effectiveness quotient' has been developed as an overall measure of institutional effectiveness. This quotient serves as a dependent variable in the examination of a set of independent variables. The 'effectiveness quotient' is a function of total black enrollment and total black graduates in all institutions. Comparisons will be made by type of institution (public, private, TBI, TWI), size of the institution, and other variables in an effort to identify and describe factors which serve to increase or decrease institutional effectiveness.

Measures of input-output are also used in the model of analysis, thus suggesting a concern for institutional efficiency. The efficiency measure, which encompasses an input-output model (Parsons, 1956; Sower and Miller,

1964; Hart, 1974; Sower, 1976), allows the study to account for student preparation as an input indicator. This is important in that some of the traditionally black institutions enroll large numbers of educationally disadvantaged students because better prepared students are recruited by other institutions. Efficiency and effectiveness are thus affected by this situation. Yet, there is continuing evidence that traditionally black institutions are still effective in admitting, retaining, and graduating students whose educational opportunities have been limited. This study examines the reasons for this continuing success within an input-output model and through the use of an effectiveness quotient. Policies and practices are identified which are effective, and suggestions for replicating such policies and procedures in other institutions are made.

Chapter 2

RESEARCH REVIEW

Background

The research problem of concern in this study is the measurement of institutional effectiveness in undergraduate colleges and universities, and the attempt to identify and describe factors which contribute to institutional effectiveness in producing black baccalaureates. A further concern once the most salient factors in institutional effectiveness are identified and described is how these factors can be translated into policies and practices for other undergraduate institutions that have not traditionally served black students.

For Parsons (1956), an organization is seen as a system which 'produces' an identifiable something which can be utilized in some way by another system. Thus, the output of an organizational system is, for another system, an input. Parsons' general model has three anchor points: (1) the systems from which an organization receives its inputs or resources; (2) the values, structure, and norms which compose the organization as a system; and (3) those systems which use the output of an organization as an input. Effectiveness is measured by the extent to which inputs accomplish an organization's objectives and efficiency is measured by the relationship between inputs and outputs.

The study of organizations has evolved from a closed system (Taylor, 1911; Weber, 1947) approach to an open-system (Bernard, 1938; Selznick, 1949) approach, with a 'natural-system' (Roethlisberger and Dickson, 1939) perspective serving as an off-shoot of the open system. The closed-system approach assumed that the organizational problems of an enterprise can be analyzed and solved within the internal environment and that changes in the external environment could be accommodated within the existing organization. The open-system

approach stresses that organizations are not autonomous entities. Organizations are dependent on other organizations and social units for input and output, for the relative stability of these transactions and the assurance of their continuation into the future, and for the varied social and psychological benefits that the environment can offer the organization. The natural system approach is a variation on the open-system model. This approach assumes the system to be determined by nature, and it is our incomplete understanding which forces us to expect uncertainty. It is acknowledged that there is considerable interdependence with the environment.

The open-system approach is particularly relevant in any study of undergraduate institutions. A primary goal of these institutions is to produce students with baccalaureate degrees. To accomplish this goal, the institutions need input of students and resources from the broader environment (Thompson, 1967; Hart, 1974). This input needs to be consistent and predictable in order for these institutions to sustain themselves. The institutions themselves are characterized by particular norms, values and structure. The primary output of these institutions are students with baccalaureate degrees in various fields, which then becomes input for other institutional systems (e.g., graduate and professional schools, corporations, public agencies, etc.). The effectiveness of an undergraduate institution is a function of its ability to secure the necessary input (students, resources) and to produce an output (graduates with BA, BS degrees), through an educational process governed by the institutional system (norms, values, structure). In carrying out this function, there is a necessary interdependence with the institutional sphere (Hart, 1974), or the task environment (Thompson, 1967).

In terms of input, black students have been able to gain greater access to traditionally white institutions in recent time. However, the access issue persists in that

blacks are underrepresened in many traditionally white institutions. Following Blackwell (1981), access refers to the enrollment of black students in traditionally white institutions. Access can be further sub-divided into three levels. Level one is "weak or limited access," level two is "approximate access," and level three is "equal access." Blackwell measures these three levels of access in relation to the proportion of blacks in the state or national population. Blackwell also identifies five economic barriers to higher education which can affect the input. These barriers are, (1) high rates of unemployment among the black population, (2) inadequate income to support students in higher education programs, (3) low occupational status, (4) limited access to scholarships and fellowships, and (5) fear of excessive indebtedness resulting from loan programs. Given declining enrollments at most undergraduate institutions, the issues of access and economic barriers are important input measures for both TBIs and TWIs.

Studies of Desegregation in Higher Education: The Southern Education Foundation

Another input measure is federal support programs. Title III of the Higher Education Act of 1965 has provided almost 10 percent of the general expenditure funds for historically black colleges and universities in recent times. Fincher (1980) has shown that historically black colleges strongly support Title III as a crucial factor in the development of those institutions. About half of the institutions participating in Title III are TBIs. This program, as an input, is seen as strengthening the institutional system in such areas as institutional planning and management, faculty development, and curriculum improvements.

In an enrollment patterns study, William F. Brazziel and Marian E. Brazziel (1980) studied undergraduate enrollment patterns in 19 states affected by the *Adams*

litigation. Among their major findings were that black enrollment in all the public and private colleges and universities in the 19 states in 1976 and 1978 corresponded to Blackwell's notion of "approximate access"; total black enrollment represented about a 3.5 percent increase between 1976 and 1978, and a nearly 20 percent increase between 1974 and 1976; black students enrolled in TBIs declined by close to 5,000 between 1976 and 1978, while black enrollment in TWIs increased by about 6,000; the percentage of black students enrolled in two-year institutions increased from 36.7 in 1976 to 38.8 percent in 1978, and nationwide about 34 percent of all students are enrolled in two-year colleges. They also note that TBIs still award close to half of the approximately 60,000 undergraduate degrees earned by black students each year, even though TWIs enroll a greater number of black students than do TBIs.

In a study of the two-tier system in Florida, Charles M. Grigg (1980) found that there was a decline in the percentage and number of black undergraduates in all levels of the Florida higher education system, a decline in the number of both blacks and whites at Florida A & M University, that a higher proportion of whites earn associate of arts degrees and transfer to upper division studies in the state university system than do blacks, and that a higher proportion of whites than black community college transfers who enter the university system stay on to complete baccalaureate degrees.

A study by Anne Pruitt (1981) of employment data from 232 TWIs, found that employment gains by blacks were miniscule in the 1975-77 period. Community colleges led the way in hiring black facutly, and that flagship institutions tended to hire more blacks in non-faculty positions. The role of black faculty is particularly important in the recruitment, admittance, retention, and graduation of black professionals, according to Blackwell (1981). It is probably accurate to state that this im-

portance can be attached to black faculty in undergraduate institutions.

Thomas and Braddock (1981) found that higher scoring students of both sexes tend to matriculate at four-year colleges, selective colleges, private colleges, and predominantly white colleges. This study, which uses the student rather than the institution as the unit of analysis, states that although the predominantly black colleges continue to graduate a disproportionate percentage of black students, they presently account for only one-third of black enrollment.

Desegregation in Higher Education: Alexander Astin and Colleagues

Alexander Astin and Robert Panos (1969), in a study of vocational and educational development of college students, make use of an input-output research model where student input data, student output data, and college environmental data are the categories of information. Student input data are seen as the student's abilities, achievements, family background, educational and career plans. Student output data consist of the student's educational status and aspirations and career plans. College environmental data consist of administrative and environmental characteristics of the student's institutions. A total of 52 input measures and 28 output measures were developed based upon information provided by the students. Environmental measures were of two broad types: (1) the characteristics of the institution itself (its size, selectivity, permissiveness, etc.), and (2) special experiences within the college.

Among their findings are that TBIs tend to facilitate the desire to go on to graduate study and that black students are somewhat more likely to choose a career in health professions or in social sciences.

Astin's (1977) later work through the Cooperative Institutional Research Program (CIRP) was initiated at

the American Council on Education in 1966 and is now conducted jointly by ACE and UCLA. As Astin notes, the task of evaluating how students are affected by their college is composed of three major undertakings: (1) understanding the meaning of student change; (2) developing student outcome measures; and (3) designing the analysis of college impact.

Astin identified student outcomes as being either affective or cognitive where the data are either psychological or behavioral. In addition, Astin introduces a temporal dimension in that most colleges hope to produce long-term rather than short-term changes. The quality, or intensity, of the student's college experience can be measured in terms of student involvement in the college environment. High involvment refers to students who spend most of their time on campus, are committed to their studies, are actively involved in campus organizations, and interact frequently with faculty and other students. Astin further postulates a direct connection between involvement and persistence. He defines persisters as those students who complete a degree program within a specified time. Among full-time freshmen entering college for the first time, about half earn baccalaureate degrees within four years.

The most important environmental characteristic associated with college persistence, according to Astin, is living in a dormitory during the freshman year. Persistence is also enhanced by involvement in the campus environment, receiving major support from parents, and is reduced by attending a 2-year college and poor academic performance. The poorest persistence rates are also found in smallest (below 500) and moderately large (10,000 to 20,000) institutions. Further, black students, compared with non-blacks of similar ability, are more likely to persist and to enroll in graduate school, but they are less likely to graduate with honors.

Astin (1982) furthered his earlier work in his examination of minorities in American higher education. Among his key findings are that over the 1974-78 period, blacks in the 20-25 age range have a mean percentage high school dropout rate of 29.4 (N=6,560) compared to a mean percentage dropout rate of 20-25 year old whites of 17.8 (N=58,873). These figures reflect a potentially smaller proportion availability of black high school graduates for higher education. The mean percentages also indicate that blacks are nearly 1.7 times more likely to be high school dropouts than are whites.

On the other hand, Astin's data show a positive indicator for an output measure in relation to black students. In a comparison of bachelor's degree recipients and first-year graduate students, Astin's figures indicate that blacks have a higher ratio of first-year graduate school enrollments to bachelor's degrees received than do whites (.70 for blacks to .60 for whites) for 1975-76. These data imply that black graduates, as aggregate output of the institutional system, were more likely to go on to graduate education than were white graduates in 1975-76.

Turning again to input measures, Astin's data indicate that in relation to college admission test scores of high school seniors and anticipated major in college, white students achieve composite SAT scores that are generally 1.3 to 1.4 times higher than test scores of blacks. Astin's figures also indicate that as entering freshmen, blacks are overrepresented in only business and social sciences. Upon receipt of the baccalaureate degree, blacks are underrepresented in all fields. Severe problems of retention can be inferred from these data.

In relation to persistence and institutional type, black students are more likely to complete their degree at a four-year private college that is prestigious, selective, with generous educational and general expenditures per

student, with high tuition and average faculty salaries. Astin reports a negative correlation between persistence and the student-faculty ratio.

Further, Astin notes that without exception, blacks attending colleges in the Northeast get higher grades, are less likely to drop out, and are more likely to be satisfied with their undergraduate experience than blacks attending institutions in other regions.

Williams' (1982) work on blacks in higher education, found a positive correlation between persistence and attending a black college in a 1975-77 sample ($N=2,779$, $r=.14$, $p \leq .05$). She also found a positive correlation between persistence and prestige, selectivity, per-student expenditures, and tuition for 4-year college entrants. Further, past research has indicated that support from scholarships and grants has a positive impact on persistence, whereas reliance on loans has a negative impact. In sum, Williams finds that blacks are most likely to persist to degree completion if they come from a relatively high socio-economic background, attend an integrated high school, make good grades in high school, perform well on aptitude tests, and develop good study habits. Blacks have a better chance of completing the degree if they initially enroll in four-year colleges or universities, especially in high quality institutions located in the Northeast region of the United States.

McNamara and Scherrei (1982) examined college women pursuing careers in science, mathematics and engineering in the 1970s, by race. Among blacks, females were more likely than males to report having "A" averages in high school. Black males and females were equally likely to report they were very well-prepared in mathematics and science in high school in 1975 and 1977. Black females were more likely than males to attend a university as college freshmen. However, black men were a little more likely than women to major in

science. Half of black women who graduated with a major in physical sciences or mathematics had plans to major in this area at entry.

Black Students on White Campuses

Gamson and Arce (1978) trace the implications of increasing numbers of black students on white campuses, particularly in the post-1967 period. Their approach describes the federal role, partciularly in promoting legal desegregation of higher education, and its involvement in financial aid programs. The passage of the Higher Education Act in 1965, with provisions for a series of new financial aid programs, greatly accelerated the federal government's encouragement of equal access to higher education. The Higher Education Amendments revised some of the programs of the 1965 Act and added the Basic Educational Opportunity Grants (BEOG). Taking the philosophy and approach of the G.I. Bill, the new grants were based on the concept of entitlement. Gamson and Arce go on to examine historical trend of black enrollment in higher education, white institution's responses to black students, faculty and administrative response to black students, and student response.

Peterson (1978) examines the environmental context affecting colleges and universities. These factors include local community characteristics and groups, competitive conditions, federal legislation and executive or judicial rulings, state legislation or state agency direction, state and federal funding, and other institutional support groups. Of the 13 schools examined in the larger study of which Peterson's work is part, all had external environments that were supportive of increased black enrollments or favorable internal predisposing factors.

Peterson and Davenport (1978) in examining institutional attractiveness for black students, found that the mean score for black students exceeded the mean score

for all students on only the measures of good academic reputation of the institution and the availability of a good program in preferred major. On the other ten measures of institutional attractiveness, the mean score for black students was less than that for all students.

Blackburn and Peterson (1978) examined administrative and faculty responses to an increase of black students. Their examination of factor loadings with zero-order correlations among the indices expressed an institutional ideology which asserts that there should be a high institutional priority on black issues, an emphasis on more academic support programs, and a commitment to affirmative action. In general, the authors found that administrators and faculty in the sample of 13 colleges and universities demonstrated essentially the same moderate social values, with administrators expressing stronger or more favorable views about minority issues.

Mingle (1978) in an examination of four universities on faculty and departmental response patterns found that faculty holding universal values about standards tended to view the long-range impact of minorities in negative terms ($r=-.35$). They also tended to be less inclined to assign their institution responsibility on race issues ($r=.29$). Universalism was also related to a belief that blacks should become fully integrated into the culture and organization of the institution ($r=.37$).

Gamson (1978) in an examination of racial climate at four universities found high levels of responsiveness to black students. The institution's responses to black students were related to an overall climate of concern with, and commitment to, dealing with racial issues.

Persistence, Attrition and Testing

A 1980 research report by the Institute for Study of Educational Policy analyzed student persistence and attrition rates, by race. The study also examined the rela-

tionship of Federal funds for black and non-black institutions. Eckland and Henderson (1981) found that independent of race, social class, or ability, men were somewhat more likely to go to college than women. However, women were more likely to graduate on schedule. Men were more likely to return if they dropped out. Gordon's 1976 study using linear correlations between high school percentile rank and test scores among black students concludes that the results raise the question of how ACT and SAT scores should be used in the admission process.

Morris, et al. (1981), in a study of the status of black Americans in higher education from 1970 to 1979, found a negative correlation between the level of selectivity and lack of progress for blacks. An Institute for Services to Education (1979) study examined the correlation between standardized college admissions tests and life achievements of students attending historically black colleges. The findings show that despite low initial scores on standardized tests, study participants were able to achieve considerable educational attainment and career success. Miller, et al, (1977) in a study of the factors affecting the admission and enrollment of minority students at the twelve state universities in Ohio found that major factors affecting enrollment are geographic location, and the strength of the tutoring, counseling, and social, academic, and cultural programming services available to minority students.

Pfeifer and Sedlacek (1970), in a study of academic predictors for black and white students at the University of Maryland, found that SAT scores were correlated with grades about as highly for whites as for blacks. However, high school grades were not a valid predictor for black males. Coleman (1974) in a study examining the relationship between the level of achievement motivation and grades in psychology showed no correlation between the test scores on the Personality Questionnaire and grades in psychology courses. Coleman's sample consisted

of black males and females from lower social class backgrounds. Reichard and Hengstler (1981) in a study of black and white students in a predominantly white university prior to entrance, while enrolled, and within one year after degree completion found a greater need for financial assistance on the part of blacks. Black students generally scored lower on SATs, and this difference in aptitude and achievement remained throughout the college years as evidenced by the differences in GPA for graduating seniors.

Institutional Issues

Williams, Gooden, et al. (1982) in a study of admissions criteria and the minority student found that four-year historically white colleges rank GPA, class rank, high school curriculum, academic curriculum and test scores as the top five criteria for admission. Public universities ranked the top five as GPA, academic curriculum, class rank, high school curriculum, and test scores, while private non-sectarian institutions ranked GPA, academic curriculum, high school curriculum, class rank and motivation. Public colleges viewed the top five criteria as GPA, class rank, high school curriculum, test scores, and academic curriculum. Black colleges (public and private) ranked the top five criteria as GPA, test scores, class rank, academic curriculum and high school curriculum. Private universities appear more likely to identify minorities for admissions purposes. However, minority students will continue to fare less well when evaluated by traditional measures, at least in the immediate future. Black colleges have led the way in admitting students who were deemed inadmissable to predominantly white colleges and developing them through supportive efforts into highly competitive college graduates.

Blackwell (1982) reminds us that at all levels of education, black Americans registered a more rapid rate of

educational attainment than did white Americans. However, in 1979, the National Advisory Committee on Black Higher Education and Black Colleges and Universities reported that in 1977 there were more black dropouts between the ages of 18 and 24 than there were black college enrollees that year. As recently as 1979, only 13 percent of the most able black students as measured by performance on the SAT were enrolled in black institutions.

In his study of blacks in graduate and professional schools, Blackwell (1981) reminds us that despite gains made during the 1970s, there are danger signs ahead. These danger signs include declining or stabilizing black undergraduate enrollment as potential input to graduate and professional schools, a decrease in commitment to aggressive recruitment strategies, fall-out from the *Bakke* case which encourages some institutions to reduce their programs for minority students and to increase the weights assigned to objective admissions criteria when confronted with difficult choices, and opposition to minority student programs by the public and by influential special interest groups. Blackwell makes a number of recommendations aimed at enhancing the mainstreaming of outsiders into graduate and professional schools. A key ingredient in the mix of recommendations is the need to admit, retain, and graduate more black undergraduates, some number of which will then go on to graduate and professional schools, and then on to careers in the professions.

Willie and MacLeish (1978), in a study of priorities of presidents of black colleges, found that educational priorities ranked first, financial priorities second, and management priorities third. The educational priorities dealt with matters such as curriculum reform, faculty development, improving the system for advising students, innovations in career education, and undergraduate concentration in the professions. In a study of financing

the black college, Jones and Weathersby (1978) found that in 1970 state and local governments accounted for 69.7 percent of the educational and general income at black public institutions. In 1975, this proportion shrank to 56.9 percent. In contrast, state and local government accounted for only 3.6 percent of the income for operations at independent institutions in 1975, and only 1.5 percent in 1970. Tuition and fees, on the other hand, are an important source of funds for the independent sector and less important for the public sector. The state-assisted institutions spend, on the average, about twice as much as the independent colleges. On a per-student basis, the independent sector spends about one-third more per student on educational and general expenditures. Public black colleges spend a greater percentage of their funds on instruction than do those in the private sector. Bowles and DeCosta (1971) in a study of black higher education concluded that the black colleges are underpricing their services, which is to say they are charging insufficient tuition—especially the private colleges.

In on-going research on the dropout rate among blacks in graduate and professional schools, Allen (1983) offers findings which have relevance to the concerns of this study. Allen's research at six predominantly white universities suggests that the campus climate and support system may be critical. He has identified three factors contributing to the attrition of blacks. These are faculty relations, social isolation, and the lack of adequate support services, such as financial aid.

Philosophy of Education

Finally, of importance in persistence among black students and institutional effectiveness are the norms and values of the institution. Norms and values of an undergraduate institution can perhaps be described as the philosophy of education of a particular institution. Spencer

(1979) describes three philosophies of education. These are the philosophy of merit which holds the degree to signify an intellectual achievement, the philosophy of contract which considers the degree to be a reward for effort, and the philosophy of right, which considers the degree to be one of the rights of citizenship associated with the welfare state. It has been argued that BEOG grants, as a form of entitlement, have aided the shift of the philosophy of education to a philosophy of right. Astin (1982) states that public higher education has evolved from a limited low-cost, meritocratic system to one of open and potentially unlimited access for all citizens regardless of their ability to pay or their previous educational achievement. This change in federal policy—from the focus on "all who are able" in the National Defense Education Act of 1958 to the concerns for "all who can benefit" in the Higher Education Act of 1965—led eventually to the entitlement provisions of the Pell Grant program established by the Education Amendments of 1972. Since 1965, federal policy has been primarily concerned with underwriting the individual costs of access and participation.

Public policy generally has focused on the issue of access to any post-secondary institution, assuming approximately equal effects and benefits of college attendance (Astin, 1982). Indeed, the state's interest in, and responsibility for educational access and opportunity may well conflict with traditional notions of academic quality, as represented by the philosophy of merit. The resolution of this dilemma of equal access and educational quality is just now becoming the subject of intense debate in higher education as reflected in efforts to raise minimal academic standards for admission in various states such as California and Massachusetts.

Data Collection

The data collection phase consists of three parts. Part one consists of data gathered on total undergraduate en-

rollment by race, total earned degrees by race, and available SAT information by race, for the 1972-73 - 1980-81 period. Enrollment and earned degree information was compiled for four-year institutions from published figures released by the U.S. Department of Education, Office for Civil Rights. Due to reporting requirements for institutions by race, more detailed and accurate figures are available for the study years 1976-77, 1978-79, and 1980-81, than for the study years 1972-73 and 1974-75. This caveat should be borne in mind in any analysis and interpretation of the data. Other data sources used in this phase include published figures from the National Center for Education Statistics (NCES), the *1981-82 Fact Book for Academic Administrators* published by the American Council on Education (ACE), *Trends and Patterns: A Study of Enrollment in Higher Education, 1970-79*, published by ACE and NCES, and Blackwell's (1982) article on "Demographics of Desegregation." SAT data by race were compiled from the report on *Profiles, College-Bound Seniors, 1981*, published by the Admissions Testing Program of the College Board, and from available figures published by Astin in various places.

Once enrollment and earned degrees figures were compiled by race, for each available study year an effectiveness quotient (EQ) score was calculated. Comparisons were then made for each study year, by racial group, as to the effectiveness of the universe of four-year undergraduate institutions in the production of baccalaureates. This aggregate index of effectiveness was a first step in determining the performance level of the universe of institutions over the study years in the production of students with bachelor's degrees. The aggregate EQ index also served at this point to indicate levels of persistence and problems in retention among different racial groups at the undergraduate level.

Part two consisted of selecting a sample of traditionally white institutions (TWIs) and traditionally black

institutions (TBIs) in order to gather more detailed institutional data. The sampling plan was of a stratified design. Utilizing the Cooperative Institutional Research Program (CIRP) publications, *The American Freshman: National Norms for Fall 1980,* and for 1978, 1976, 1974, and 1972, which each contains a listing of cooperating institutions as a starting point, a sample for each study year was drawn using a random number table. This design yielded a sample consisting of 84 TWIs and 18 TBIs for each study year. The sample of TWIs was thus 4 percent of the universe, while the sample of TBIs was 17 percent of the universe. This design represents an oversampling of TBIs.

Once the sample was drawn, and a list of specific institutions (both TWIs and TBIs) was in hand, the U.S. Department of Education, Office for Civil Rights publications were consulted to derive enrollment and earned degree figures for each institution in the sample for each available study year. A spread sheet was then created for each available study year with figures for each institution in the sample. Columns in the spread sheet contained the following information for each institution.

(1) Number of black students enrolled;

(2) Number of earned degrees by black students;

(3) Effectiveness quotient (EQ) score;

(4) Plus (+) or minus (—) sign, indicating whether the institution had an EQ score above or below the national norm EQ for black students;

(5) How the state ranked in terms of:

a) Relative cost of higher education;

b) Appropriations per student;

c) Adjusted appropriations per student;

d) Change in appropriations per student over 2-year period;

(6) Percent black student population in the institution;

(7) Percent black population in the state;

(8) Using (6) and (7) above, a determination of level of access, i.e., 'weak, limited', or 'approximate,' or 'equal,' from Blackwell (1981);

(9) Median black income in the state;

(10) Size of school in terms of total student population;

(11) Litigation status, i.e., whether or not the state is an *Adams* state;

(12) Presence or absence of a special admissions program;

(13) Presence or absence of a retention program.

From the spread sheets for each available study year, a top ten was calculated for all institutions with the highest EQ scores. Next a top five for TBIs was determined using the same method. Then, the number and percent of TWIs and TBIs above and below the national norm EQ was determined. Comparisons were then made between the institutional sample in Part Two and the universe of undergraduate institutions in Part One.

Next a research review was conducted in the attempt to identify at least twenty (20) studies that examined persistence among black undergraduates and/or institutional effectiveness among undergraduate colleges and universities. This review was organized along the lines of the input-output model of analysis used in the research.

A total of thirty-one (31) studies are included in the final research review out of over 100 studies initially identified for possible inclusion. Some of these 31 studies included in the research review overlap in the three components of the input-system-output model of analysis.

Those studies included in the research review are denoted by an asterisk (*) in the References section at the end of this report. Among the studies included in the research review, fifteen (15) contain findings which can be grouped under the Input portion of the model. Twenty-six (26) contain findings which can be grouped under the System component; while five (5) contain results grouped under the Output component.

Data Reduction and Analysis

Using factor analysis techniques, correlation coefficients, multiple regression techniques, and a modified version of meta-analysis, the strongest factors in persistence are identified. These factors serve as the cause, or independent variable, while the effectiveness measure (EQ), is the effect, or dependent variable. The institutions in the sample of Part Two are organized according to their EQ score, and percentiles are created which serve to group high, medium, and low index institutions. The persistence factors are grouped in three categories. These categories are either institutional factors, individual factors, or contextual factors. Further, the factors are defined in terms of their malleability.

Characteristics of the most effective institutions (i.e., top ten for all, top five for TBIs) are then compared with the presence or absence of those institutional and contextual factors which are deemed most salient in persistence. Taking off from the most salient individual factors, an examination is then made of the type of student most likely to persist to degree completion.

This phase of the research concludes with the testing of ten (10) null hypotheses that relate to institutional effectiveness and persistence. These hypotheses are the following:

(1) There is no difference in effectiveness between TBIs and TWIs in producing black students with bachelor's degrees.

(2) There is no difference in effectiveness between public and private colleges and universities.

(3) There is no difference in effectiveness between public TBIs and private TBIs.

(4) There is no difference in the percent of black faculty between colleges and universities that are more effective in graduating black students than those that are less effective.

(5) There is no difference between more effective and less effective institutions in the likelihood of having special admissions programs.

(6) There is no difference between more effective and less effective institutions in the likelihood of having a retention program.

(7) There is no difference between more effective and less effective institutions in the quality of financial aid.

(8) SAT scores do not have a significant relationship to institutional effectiveness.

(9) Student-faculty ratios have no relationship to institutional effectiveness.

(10) Per-student expenditures have no relationship to institutional effectiveness.

The development and use of the effectiveness quotient should be considered exploratory. That is, in addition to answering particular questions about institutional effectiveness and salient contributing factors, the effectiveness quotient will also raise questions that cannot be answered within the scope of this research project. In that sense, it is hoped that this measure and the methodology used in this research serves a heuristic function.

The research synthesis taken from studies identified earlier in this chapter yielded correlation coefficients,

significance levels and sample sizes. For measures of persistence and effectiveness, correlations were averaged across the relevant studies. These values were then correlated with the combined EQ scores for the study years 1976-77, 1978-79, and 1980-81, and can be found in Tables 4.14, 4.15, and 4.16. Again, the EQ scores represent institutional measures of performance in graduating black students with BA and BS degrees. The total number of institutional cases for these three study years is 276, of which 47 are TBIs. Study years 1972-73 and 1974-75 were not included in this analysis due to the weakness of the data on earned degrees by institution. As noted earlier, thirty-one (31) research studies were used in the synthesis.

The factor analysis served to categories salient factors into three groupings: institutional, contextual, and individual. Multiple regression techniques were then used to determine the variables under each of these factors which contributed most strongly to persistence and effectiveness. Again, the EQ score serves as the proxy variable in measuring institutional effectiveness and performance, and serves as a standard of persistence.

Meta-Analysis

There are three generally accepted indices of overall treatment impact in synthesizing research outcomes. These indices include vote counitng, averaging effect sizes, and combining significance tests. The index of averaging effect sizes is used in an attempt to ascertain the relative impact of institutional, contextual, and individual factors upon persistence and effectiveness. The goal of this phase of the analysis is to build upon the findings of the correlational studies and the multiple regression techniques in order to attempt to rank those factors considered most salient in contributing to institutional effectiveness. This three-pronged method of analysis is undertaken in a step-by-step fashion with the

goal of ranking the factors in that policy studies are strengthened through an attempt to identify and rank factors of concern around a particular issue of public policy. The research goal and related policy objective is to attempt to determine whether institutional, contextual, or individual factors are most likely to enhance institutional effectiveness in the production of black baccalaureates.

As with the use of the EQ measure, this particular approach to data reduction and analysis should be considered exploratory. It is hoped this approach to analyzing institutional effectiveness can serve a heuristic function for other educational researchers interested in the question of factors contributing to the production of black baccalaureates.

The report concludes with a section on policy implications. This section examines "what makes effective institutions effective" from a policy standpoint, and what it is that other colleges and universities can adopt for blacks within their particular institutional context. That is, some factors which contribute to institutional effectiveness are more malleable than others in terms of policy implications. For those more malleable factors, how can less effective institutions enhance these factors within their own context, and what are costs and benefits associated with such an approach?

Chapter 3

INSTITUTIONAL EFFECTIVENESS IN HIGHER EDUCATION

The aggregate undergraduate student enrollment and earned degree figures for the study years are used to arrive at an overall effectiveness measure. These 'national norms' of institutional effectiveness reflect the performance level of higher education during the decade of the 1970s. They also indicate degrees of persistence on the part of undergraduate students within the institution of higher education during the decade under consideration in this research.

More detailed undergraduate enrollment and earned degree data exist for the academic years 1976-77, 1978-79, and 1980-81, than for the academic years 1972-73 and 1974-75. For the latter two academic years, estimation procedures are used to arrive at figures for earned degrees by race. For all five academic years it is possible to derive and index of effectiveness by race. However, this index is more accurate for 1976-77, 1978-79, and 1980-81, due to the greater detail in the reporting requirements imposed on colleges and universities for these academic years in relation to earned degrees by race.

The aggregate effectiveness quotient, or the national norm of effectiveness, provides data as to the performance level of higher education in terms of graduating black students. In addition, this national norm provides a comparison by race (with a particular focus on blacks, whites, and Asians) of the performance level achieved by undergraduate institutions over the 1972-73 to 1980-81 period.

The national norm of effectiveness can be used as a benchmark in determining whether a particular college or university in the institutional sample of TWI or TBI is above or below the norm. It is also possible to deter-

mine the number and percent of all institutions, as well as TBIs, which fall above or below the norm for a given academic year. Comparisons can then be made between TBIs and TWIs in order to ascertain which type of institution has been more effective in a given academic year, and over the decade under study.

This section focuses on institutional effectiveness starting with the total population of undergraduate institutions and then comparing this universe with a sample of undergraduate institutions. This sample is drawn from the universe of nearly 2000 four-year colleges and universities, of which 105 are TBIs. The institutional sample was drawn in such a way as to yield a sample size consisting of eighty-four (84) TWIs and eighteen (18) TBIs.

Examining the national norms of effectiveness by race over the 1972-73 to 1980-81 period indicates a trend of declining institutional effectiveness in relation to blacks, whites, and Asians. As Table 3.1 shows, for all three

Table 3.1: Effectiveness Quotient (EQ) Scores for B.A., B.S. Degrees by Selected Race, Selected Years and Total —All Institutions Combined

Year	Black	White	Asian	National Norm
1972-73[a]	.10	.14	.12	.13
1974-75[a]	.08	.13	.12	.12
1976-77[b]	.07	.12	.09	.11
1978-79[b]	.10	.13	.11	.13
1980-81[b]	.07	.11	.09	.08

[a] Detailed racial data on earned degrees by race not available. Numbers are based on estimation procedures from years with racial data.

[b] Based upon OCR enrollments and earned degrees by race.

Source: U.S. Department of Education, Office for Civil Rights. *Racial, Ethnic and Sex Enrollment Data from Institutions of Higher Education, Fall 1972, 1974, 1976, 1978, 1980.* U.S. Department of Education, Office for Civil Rights. *Bachelor's Degrees Conferred by Institutions of Higher Education by Race, Ethnicity and Sex: Institution, State, and Nation, 1976-77, 1978-79, 1980-81.*

racial groups there was a decline in institutional effectiveness in graduating undergraduate students. The impact of institutional retrenchment and consolidation in higher education over the period of study probably contributes to this decline. The consolidation and contraction which proved necessary during the 1970s reduced or eliminated several student support programs at both the institutional and societal levels.

The numbers in Table 3.1 also reveal a decline in the ability of black, white, and Asian undergraduates to persist in obtaining a bachelor's degree. One salient factor in persistence to an undergraduate degree is the ability to finance one's education through scholarships, not loans. Retrenchment in higher education at the societal and institutional levels reduced the volume of scholarship aid available. Students ordinarily eligible for scholarship aid were forced to turn to loans in order to finance their undergraduate education. Increasing inflation and interest rates, and a generally recessive national economy rendered loans a risky proposition for both the student and the lending institution.

One constant over the 1972-73 to 1980-81 time period is the rank order of effectiveness by racial group. That is, in each year under study, and for the entire time period under examination, undergraduate institutions were more effective in graduating Asian students than black students. In each academic year under study except for 1980-81, the effectiveness quotient (EQ) for black students was consistently less than the national norm.

Table 3.1 indicates a declining trend in persistence among black undergraduates in all four-year institutions, except for the 1978-79 academic year where there was a noticeable increase over 1976-77. However, there was a significant decrease between 1978-79 and 1980-81. The overall declining trend signals a problem in retention.

As a comparison to these EQ scores for all four-year institutions, let us examine Blackwell's (1982) figures for full-time B.S. in engineering enrollment programs for black students for all institutions and B.S. engineering degrees for black students for all institutions for 1972-73, 1974-75, 1976-77, and 1978-79.

Table 3.2: Effectiveness Quotient for B.S. in Engineering Enrollment/Earned Degrees for Black Students for Selected Years—All Institutions Combined

	(a)	(b)	(c)	(d)	(e)	(f)
Year	Total Black Student Enrollment	Percent Black of Total	Total B.S. Awarded Black Students	Percent Black of Total	Black Student EQ	All Races EQ
1972-73	5,508	3.0	657	1.5	0.12	0.22
1974-75	6,827	3.4	734	2.0	0.11	0.19
1976-77	9,828	3.8	844	2.1	0.09	0.16
1978-79	12,954	4.2	901	2.0	0.07	0.17

Source: James E. Blackwell, "Demographics of Desegregation", in *Race and Equity in Higher Education*, American Council on Education, 1982.

As Blackwell notes, black undergraduate interest in the field of engineering has expanded enormously within the past decade. As shown in Table 3.2, the absolute number of black students enrolled in engineering more than doubled between 1972 and 1978. The percent of black students enrolled in engineering increased consistently between 1972 and 1978. The total B.S. degrees awarded to black students in engineering increased by a factor of 1.4 times between 1972 and 1978. However, the EQ scores in column (e) of Table 3.2 show a steady decline. This measure indicates an increasingly serious problem of retention among black students in engineering.

This problem of retention is also reflected in the EQ scores for black students in Table 3.1. That is, Table 3.1 shows a steady decline in EQ scores, except for 1978-79. The EQ scores for black students in engineering as re-

ported in Table 3.2 are higher than for black students in all fields as reported in Table 3.1, except for 1978-79. For all races, the EQ scores for engineering students are consistently higher than the EQ scores for all fields, with the smallest deviation being in 1978-79.

Thus, for engineering and all other fields, the decade of the 70s has seen an increase in the numbers of black students enrolled and graduated. However, this seemingly positive trend is overshadowed by declining EQ scores signalling serious problems of retention. This situation suggests something akin to a "revolving door" policy by colleges and universities in relation to black students. That is, there seem to be problems in the institutional system in relation to issues of persistence on the part of black students.

Astin's 1982 educational pipeline indicates that 83 percent of whites graduate from high school while 72 percent of blacks graduate from high school. Of this number, 38 percent of whites, and 29 percent of blacks, enter college. Finally, 23 percent of whites and 12 percent of blacks complete college.

Thus, whites are 1.2 times more likely to graduate from high school than are blacks. They are 1.3 times more likely to enter college than blacks, yet are 1.9 times more likely to complete college than are blacks. The fact that whites are nearly twice as likely to complete college than are blacks suggests the importance of structural factors over individual factors.

Among the structural factors contributing to this significant difference in college completion rates is the median income of black families in relation to white families. In 1972, the median income (in 1979 dollars) for white families was $20,038, while for black families the median income was $11,909. The median income for black families in 1972 was 59 percent of the median white family income. This median family income gap of

41 percent has remained constant since 1972, increasing from an income gap of 39 percent in 1970.

Another factor is the generally higher unemployment rates of blacks in the labor force. In 1972, the white unemployment rate was 5.0 percent, while for blacks the figure was 10.0 percent. As Table 3.3 indicates, blacks in the labor force were nearly twice as likely to be unemployed than whites over the 1972-1980 time period.

Table 3.3: Annual Average Unemployment Rates by Race[a] (in percentage)

Year	White	Black and Other Races[b]	B/W Ratio[c]
1972	5.0	10.0	2.00
1974	5.0	9.9	1.98
1976	7.0	13.1	1.87
1978	5.2	11.9	2.29
1980	6.3	13.2	2.10

[a] Adapted from Unemployment Rates, by Race and Kind of Workers, Selected Years, 1950-1980, *1981-82 Fact Book for Academic Administrators*, American Council on Education, 1981, p. 41.

[b] Blacks make up over 90 percent of this category. In addition, the unemployment rate for blacks tends to be higher than other races in this category.

[c] This is ratio of black and white unemployment rates.

Source: *1981-82 Fact Book for Academic Administrators*, American Council on Education, 1981.

Black families thus have a significant median income gap in relation to whites, and black workers are significantly more likely to be unemployed than white workers. During a period of institutional retrenchment in higher education, these factors conspire to put financial pressures on the average black undergraduate such as to make it close to twice as likely that white undergraduates will complete college.

Further, private colleges and universities tend to be more effective in graduating black undergraduates than

are public institutions of higher education. However, the majority of black students are enrolled in public colleges and universities. It is significantly less expensive to attend public colleges and universities as indicated in Table 3.4. For all students, it is more than twice as expensive to attend a private college or university. This difference particularly affects black undergraduates who are less likely to have access to the resources to afford a private education. Black students are thus more likely to attend a public institution.

Table 3.4: Average Annual Student Charges, by Control of Institution, 1972-79 - 1980-81[a]

	Average Student Charges for Tuition, Fees, Room and Board[b]		Indexes for Average Student Charge (1967-68=100)		Consumer Price Index[c]
Year	Public	Private	Public	Private	
1972-73	1,458	3,038	137.0	137.8	126.5
1974-75	1,617	3,386	152.0	153.6	151.2
1976-77	1,803	3,898	169.5	180.9	172.3
1978-79	2,009	4,477	188.8	203.0	202.2
1980-81	2,584	5,608	242.9	254.3	253.3

[a] Adapted from Average Annual Student Charges, by Control of Institution, 1965-66 - 1980-81. *1981-82 Fact Book for Academic Administrators*, American Council on Education, 1981, p. 132.

[b] Tuition, required fees, room and board only. Does not include estimates for books, supplies, personal expenditures, and so forth.

[c] CPI converted to an academic year by averaging contiguous years and converting to 1967-68=100.

Source: *1981-82 Fact Book for Academic Administrators*, American Council on Education, 1981.

A comparison of TWIs, TBIs, and all institutions combined, shows that over the period 1972-73 to 1980-81, TBIs have been more effective in graduating black undergraduates than have TWIs. This comparison is derived from the institutional sampe drawn from the universe of colleges and universities in the United States. For each institution in the sample, an institutional EQ was com-

puted and compared with the national norm EQ. A plus or minus value was assigned to each institution based upon its EQ score in relation to the national norm. Table 3.5 summarizes the comparisons for each year under study.

Table 3.5: A comparison of Institutional EQ with National Norm EQ, 1972-73 - 1980-81

	All		TBIs		TWIs	
Year	N	%	N	%	N	%
1972-73[a]	+55	56	11	69	44	53
	-44	44	5	31	39	47
1974-75[a]	+52	55	10	63	42	54
	-42	45	6	37	36	46
1976-77[b]	+66	73	16	94	50	68
	-25	27	1	6	24	32
1978-79[b]	+55	58	10	67	40	54
	-39	42	5	33	34	46
1980-81[b]	+79	87	15	100	64	84
	-12	13	0	0	12	16

[a] As noted earlier, the figures for 1972-73 and 1974-75 are based on estimates of earned degrees by race for each institution, and for the aggregate.

[b] Enrollment and earned degrees data is based on U.S. Department of Education, Office for Civil Rights published figures.

Source: U.S. Department of Education, Office for Civil Rights, *Racial, Ethnic and Sex Enrollment Data From Institutions of Higher Education, Fall 1972, 1974, 1976, 1978, 1980*; U.S. Department of Education, Office for Civil Rights; *Bachelor's Degrees Conferred by Institutions of Higher Education by Race, Ethnicity and Sex: Institution, State and Nation, 1976-77, 1978-79, 1980-81.*

A closer examination of Table 3.5 indicates that in 1972-73, 69 percent of TBIs were above the national norm, while 53 percent of TWIs were above the national norm. In 1974-75, 63 percent of TBIs were above the national norm, while 54 percent of the TWIs were above the national norm. In 1976-77, 94 percent of TBIs were above the national norm, while 68 percent of TWIs were

above the national norm. In 1978-79, 67 percent of TBIs were above the national norm, while 54 percent of TWIs were above the national norm. In 1980-81, fully 100 percent of TBIs were above the national norm, while 84 percent of TWIs were above the national norm. Thus, for the decade under study, TBIs have consistently outperformed TWIs in graduating black students.

Chapter 4

MOST EFFECTIVE COLLEGES AND UNIVERSITIES

Background

This chapter examines the most effective colleges and universities in graduating black undergraduates over the period 1972-73 to 1980-81.

A top ten is created for those institutions with the highest EQ index. This ranking is analogous to the top ten for athletic teams, only the focus here is on effectiveness in graduating black undergraduates. Institutions included in this ranking must have a black student enrollment of at least fifty for the academic year under consideration.

The top ten ranking reflects all institutions in the sample of colleges and universities. A second ranking of the top five TBIs is also included. In some years there are TBIs included in the top ten of all institutions. Generally, the top ten is dominated by TWIs, and particularly by TWIs in the Northeast.

Again, these ranking are a function of an institution's score on the EQ index. The institutions included are those drawn from a representative sample of all colleges and universities in the United States for each academic year under study.

Once the top ten and top five TBIs are established, factors contributing to the effectiveness of these institutions are examined. That is, the concern is with reasons why a particular institution is effective in graduating black students. These factors are institutional in nature, and characteristics of effective institutions are identified and described. Much of this analysis is a product of a synthesis of research findings relating to persistence

among undergraduates. Persistence is seen as a function of particular institutional characteristics in conjunction with individual characteristics which work together to motivate the black student to complete the BA or BS degree. The concern with student characteristics implies that there is an ideal type black student most likely to persist to the degree.

Finally, this section examines the ten major hypotheses to be tested through the data available. All this information taken together provides a sense of those institutions that are more effective in graduating black students for each year of study and in aggregate, and the type of student most likely to succeed. The research synthesis provides reasons why some institutions are more effective, and why some students are more likely to succeed.

Academic Years 1972-73 and 1974-75

As noted earlier, detailed institutional figures by race are not fully available for 1972-73 and 1974-75. Estimation procedures are used through reverse extrapolation methods using the 1976-77 academic year as the baseline. Each of the 84TWIs and 18TBIs in the 1976-77 sample are examined using a formula taking into account changes in the state population and the ratio of black students enrolled in each institution to the percent black in the state population to arrive at adjusted figures in order to estimate the EQ score. The rankings for 1972-73 and 1974-75 should be interpreted with this caveat in mind. Only the EQ scores for 1972-1973 and 1974-1975 will be reported here. However, more weight should be accorded the 1976-77, 1978-79, and 1980-81, rankings in determining trends in institutional effectiveness.

Table 4.1: Top Ten Colleges and Universities in the Production of Black Baccalaureates, 1972-73

Institution	State	EQ
1. Dartmouth	NH	0.321
2. Simmons College	MA	0.317
3. Harvard	MA	0.286
4. Morehouse	GA	0.273
5. Yale University	CT	0.261
6. Springfield College	MA	0.252
7. Southern University	LA	0.243
8. Connecticut College	CT	0.231
9. Notre Dame	IN	0.223
10. Rice University	TX	0.217

Table 4.2: Top Five Traditionally Black Institutions in the Production of Black Baccalaureates, 1972-73

Institution	State	EQ
1. Morehouse College	GA	0.273
2. Southern University	LA	0.243
3. Fisk University	TN	0.233
4. South Carolina State	SC	0.197
5. Tuskegee Institute	AL	0.177

Source: U.S. Department of Education, Office for Civil Rights. *Racial, Ethnic and Sex Enrollment Data from Institutions of Higher Education*, Fall 1972, 1974.

Note: TWIs: N=83/TBIs: N=16

Table 4.3: Top Ten Colleges and Universities in the Production of Black Baccalaureates, 1974-75

Institution	State	EQ
1. Harvard	MA	0.279
2. Simmons College	MA	0.276
3. Dartmouth	NH	0.266
4. Yale University	CT	0.260
5. East Texas State	TX	0.248
6. Rice University	TX	0.236
7. Southern University	LA	0.229
8. Notre Dame	IN	0.223
9. Connecticut College	CT	0.221
10. Morehouse	GA	0.217

Table 4.4: Top Five Traditionally Black Institutions in the Production of Black Baccalaureates, 1974-75

Institution	State	EQ
1. Southern University	LA	0.229
2. Morehouse College	GA	0.217
3. Tuskegee Institute	AL	0.183
4. Fisk University	TN	0.181
5. Alabama A & M	AL	0.152

Source: U.S. Department of Education, Office for Civil Rights. *Enrollment Data, 1974-75.*

Note: TWIs: N=78/TBIs: N-16

Included in the top ten ranking for 1972-73 are six institutions in New England, three in Massachusetts, two in Connecticut, and one in New Hampshire. There are two TBIs in the top ten. The top ten is dominated by private, prestigious, and selective institutions. Of the top ten, six have EQ scores of .25 or above, signalling a high degree of effectiveness.

Of the TBI top five, only one has an EQ score of .25 or above. However, all those in the top five are considerably higher than the national norm EQ for black students in 1972-73 of .10. The top five TBIs also exceed the 1972-73 national norm EQ for white students, Asian students, and for the universe of students as reported in Table 3.1.

The national norm EQ score for black students declined between 1972-73 and 1974-75 from .10 to .08. This decline in effectiveness was also reflected in the scores of those institutions in the top ten and top five, as reflected in Tables 4.3 and 4.4.

Again, New England colleges and universities dominate the top ten with five institutions. Of these, two are

in Massachusetts, two in Connecticut, and one in New Hampshire. Perhaps surprisingly, Texas placed two institutions in the top ten. Morehouse remained one of two TBIs in the top ten, but took a dive from fourth to tenth place. As in 1972-73, private, prestigious, and selective institutions dominated the top ten.

Academic Years 1976-77/1978-79/1980-81

The most effective institutions for the 1976-77 academic year consist of a ranking topped by Simmons College, a private school in Boston, Massachusetts. As seen in Table 4.5, the top ten consists of six institutions in the New England states, three in Massachusetts, two in New Hampshire, and one in Connecticut. Further, private institutions dominate the top ten. There is only one TBI in the top ten.

Table 4.5: Top Ten Colleges and Universities in the Production of Black Baccalaureates, 1976-77

Institution State	EQ	Black Student Enrollment	Black Student Earned Degrees
1. Simmons College, MA	0.311	148	46
2. New Hampshire College, NH	0.305	59	18
3. Chaminade, HI	0.284	88	25
4. Dartmouth, NH	0.279	247	69
5. Springfield College, MA	0.278	133	37
6. Rice University, TX	0.260	104	27
7. Yale University, CT	0.257	245	63
8. Philander Smith, AK	0.249	450	112
9. Harvard, MA	0.243	441	107
10. Miami U, OH	0.242	219	53

Table 4.6: Top Five Traditionally Black Institutions in the Production of Black Baccalaureates, 1976-77

Institution State	EQ	Black Student Enrollment	Black Student Earned Degrees
1. Philander Smith, AK	0.249	450	112
2. Fisk University, TN	0.238	1,186	282
3. Lane College, TN	0.200	684	137
4. South Carolina State, SC	0.164	2,894	474
5. Alabama A&M, AL	0.139	2,735	379

Note: TWIs: N=74/TBIs: N=17

Table 4.7: Top Ten Colleges and Universities in the Production of Black Baccalaureates, 1978-79

Institution State	EQ	Black Student Enrollment	Black Student Earned Degrees
1. Harvard, MA	0.444	243	108
2. Athens State College, AL	0.356	73	26
3. Southern U., LA	0.337	2,681	904
4. Simmons, MA	0.289	135	39
5. Connecticut C., CT	0.278	54	15
6. Dartmouth, NH	0.270	259	70
7. CUNY-Brooklyn, NY	0.219	2,975	650
8. East Texas State, TX	0.217	921	200
9. Notre Dame, IN	0.210	167	35
10. Yale, CT	0.209	283	59

Table 4.8: Top Five Traditionally Black Institutions in the Production of Black Baccalaureates, 1978-79

Institution State	EQ	Black Student Enrollment	Black Student Earned Degrees
1. Southern U., LA	0.337	2,681	904
2. Fisk U., TN	0.202	1,074	217
3. Tuskegee Institute, AL	0.165	2,599	430
4. South Carolina State, SC	0.163	2,872	468
5. Lane College, TN	0.163	669	109

Note: TWIs:N=74/TBIs: N=17

Table 4.9: Top Ten Colleges and Universities in the Production of Black Baccalaureates, 1980-81

Institution State	EQ	Black Student Enrollment	Black Student Graduates
1. Athens State Coll., AL	0.712	52	37
2. New Hampshire Coll., NH	0.605	215	130
3. Harvard, MA	0.449	216	97
4. Simmons, MA	0.400	100	40
5. St. Mary's C., KS	0.382	55	21
6. Univ. of Miami, FL	0.267	667	178
7. Dartmouth, NH	0.258	275	71
8. St. John's, NY	0.257	622	160
9. Rice U., TX	0.227	88	20
10. East Texas State, TX	0.226	848	192

Table 4.10: Top Five Traditionally Black Institutions in the Production of Black Baccalaureates, 1980-81

Institution State	EQ	Black Student Enrollment	Black Student Earned Degrees
1. Bishop C., TX	0.201	658	132
2. South Carolina State, SC	0.176	3,084	543
3. Lane College, TN	0.141	747	105
4. Alabama A&M, AL	0.137	2,655	365
5. Florida A&M, FL	0.130	4,499	587

Source: U.S. Department of Education, Office for Civil Rights. *Enrollment and Earned Degrees Data, Institutions of Higher Education.* Race, Ethnicity and Sex. 1976-77, 1978-79, 1980-81.

Note: TWIs: N=76/TBIs: N=15

Institutions with an EQ score of .25 or above are either very effective in graduating black students or there are variations in the enrollment pattern that bear examination.

Among TBIs, Table 4.6 provides a ranking of the top five institutions in graduating black undergraduates. The institutional sample of TBIs consists of eighteen schools.

Of the TWIs, in 1976-77 seven of the top nine have EQ scores of .25 or above. Of the TBI, only Philander Smith has an EQ of .25 or above. It should be borne in mind that of those who enter college, whites are much more likely to complete the baccalaureate within the traditional four-year period than are minority students (HERI, 1982). According to the National Longitudinal Study, 34 percent of the whites, 24 percent of the blacks, 16 percent of the American Indians, and 13 percent of the Hispanics who entered college in 1972 had completed the baccalaureate degree by 1976.

The data in Tables 4.5 and 4.6 suggest that black students who attend particular types of institutions are more likely to complete the degree in four years. Looking at baccalaureate completion rates beyond the four year span, one finds that approximately 56 percent of white freshmen and 51 percent of black freshmen eventually receive the bachelor's degree. The average time of completion is five years.

In 1976-77, the top five ranking TBIs had a total black student enrollment of 7,949, of which 1,384 graduated. This compares with an enrollment of the top nine TWIs of 1,684 black students, of which 445 graduated. The EQ score for the TBI top five was 0.174 as compared with a TWI top nine score of 0.264. However, these figures suggest that TBIs are doing the job they were set up to accomplish, that is to enroll and graduate significant numbers of black students otherwise denied access to higher education, albeit, at a lower level of effectiveness than the top ranking TWIs.

In the 1978-79 academic year, Harvard College moved into the top position in terms of institutional effectiveness in the production of black baccalaureates. Harvard moved from ninth in 1976-77 to first in 1978-79. Simmons College fell from first to fourth. Again, New England private institutions dominated the top ten, with two from Massachusetts, two from Connecticut, and one in New Hampshire, as seen in Table 4.7.

Among the TBIs, Southern ranked at the top, Fisk remained second, and South Carolina State remained in fourth place. Philander Smith slipped out of the top five, while Lane College dropped from third to fifth.

Again, only one TBI had an EQ score above .25, while five of nine TWIs in the overall top ten scored above .25. The latter is a drop in the number of TWIs with an EQ score above .25 from the total of seven in 1976-77.

Among the TWIs in the top ten, Harvard saw slightly more than two in five black students enrolled graduate in 1978-79. Harvard's move to the top of the rankings between 1976-77 and 1978-79 was brought about primarily by a steep decline in black student enrollment, while the number of black graduates remained constant.

From among the top five TBIs in 1978-79, Southern saw one in three of its black student population graduate, Fisk had one in five, Tuskegee, South Carolina State and Lane all had approximately one in eight graduate.

Of those TWIs in the top ten, Yale had the lowest proportion, one in five, of those enrolled who graduated. For Yale, this represented a slip from one in four in 1976-77. However, unlike Harvard, Yale did experience a slight increase in black undergraduate enrollment. Simmons experienced a slight decline in both enrollment and in its EQ score. Dartmouth witnessed a slight increase in enrollment and a minor decrease in its EQ scores.

In 1978-79, the TBIs top five enrolled 9,895 black undergraduates and graduated 2,128 of them. Of the nine TWIs in the overall top ten, there were 5,110 black undergraduates of whom 1,202 graduated. The EQ for the TBIs top five in 1978-79 was 0.215 as compared to the top nine TWIs EQ score of 0.235. The top five TBIs saw an increase in their effectiveness score between 1976-77 and 1978-79, while the top nine TWIs witnessed a decline, thus closing the aggregate EQ score of the top institutions considerably.

The 1978-79 academic year thus saw the top ranking TBIs continue to pursue their established mission of enrolling and graduating black students. In implementing this mission, the top TBIs improved their effectiveness considerably since the 1976-77 academic year, while the top TWIs declined slightly in effectiveness.

The 1980-81 academic year saw Athens State College in Alabama move to the top position from number two in 1978-79. This change was brought on mainly by a steep reduction in enrollment along with an increase in the number of graduates. New Hampshire College climbed back into the top ten after being absent in 1978-79. The 1976-77 to 1980-81 period witnessed a radical increase in both black student enrollment and graduates at New Hampshire College.

Again, New England dominated the rankings with four institutions in the top ten. Of these institutions, two were in Massachusetts and two were in New Hampshire. In contrast to the previous two academic years, a TBI did not rank in the top ten. As Table 5.9 indicates, there was quite a range in EQ scores among the top ten institutions.

Of the top ten, eight had EQ scores of .25 or better. Harvard remained in the top ten, slipping from first to third, although its EQ score increased very slightly. However, Harvard's black student enrollment continued to decline. Simmons remained in fourth place, with an increase in its EQ, but a decrease in its enrollment. Dartmouth slipped from sixth to seventh between 1978-79 and 1980-81, yet experienced an increase in its black student enrollment.

Among the TBIs, Bishop College moved into the top position in 1980-81. South Carolina State moved from fourth place to second place, while Lane College moved from fifth to third. Not one TBI in the top five had an EQ score of .25 or above.

The aggregate EQ score for the top five TBIs slipped to 0.149 in 1980-81, while the top ten TWIs experienced

an increase in EQ scores to 0.302. Concurrently, the top five TBIs enrolled 11,643 students and graduated 1,732, while the top ten TWIs enrolled 3,138 black students and graduated 946. The TBIs continued their mission of providing access to black undergraduates, albeit, at a rate considerably less effective than the top ten TWIs, and at a rate of lesser effectiveness than in either 1976-77 or 1978-79.

Most Consistent Institutions, 1972-73 to 1980-81

In examining the trends in institutional effectiveness in the production of black baccalaureates over the 1972-73 to 1980-81 period, Table 4.11 and Table 4.12 summarize the top ten overall and the top five TBIs, respectively. The tables indicate the ranking as a function of years in the top ten and the mean rank over that period of time. The final column in each table indicates the rank, irrespective of the number of years in the top five or top ten. However, the number of years in the top ranking provides a measure of consistency in performance.

Table 4.11: Top Ten Institutions in Effectiveness, 1972-73 to 1980-81

Institution	State	Years In Top Ten	Mean Rank	Rank Controlling for Years in Top Ten
1. Simmons College[a]	MA	5	2.6	2
2. Harvard College[a]	MA	5	3.4	4
3. Dartmouth College[a]	NH	5	4.2	5
4. Yale University[a]	CT	5	6.5	7
5. Rice University[a]	TX	4	7.8	9
6. East Texas State	TX	3	3.3	3
7. Southern Univ.	LA	3	5.7	6
8. Connecticut College[a]	CT	3	7.3	8
9. Notre Dame Univ.[a]	IN	3	8.7	10
10. Athens State C.	AL	2	1.5	1

[a] Private Institutions.

Source: U.S. Department of Education, Office for Civil Rights. *Enrollment Data and Earned Degrees Data, 1972-79 to 1980-81.*

Five of the top ten institutional performers for the five academic years in the study period are located in New England, two in Massachusetts, two in Connecticut, and one in New Hampshire. There is one TBI in the top ten. Private, prestigious, and selective institutions dominate the rankings.

Turning now to the top five TBIs in terms of academic performance over the 1972-73 to 1980-81 period yields the following information.

Table 4.12: Top Five TBIs in Effectiveness, 1972-73 to 1980-81

Institution	State	Years In Top Five	Mean Rank	Rank Controlling for Years in Top Ten
1. Fisk University[a]	TN	4	2.8	2
2. South Carolina State	SC	4	3.5	3
3. Southern Univ.	LA	3	1.3	1
4. Tuskegee Institute[a]	AL	3	3.7	5
5. Lane College[a]	TN	3	3.7	5

[a] Private Institution

Source: U.S. Department of Education, Office for Civil Rights. *Enrollment Data and Earned Degrees Data, 1972-73, 1980-81.*

Fisk and South Carolina State are most consistent in that four of five academic years they were in the top five. However, Southern had the highest mean ranking, and the most appearances in the overall top ten ranking.

As rankings for each study year and the aggregate indicate, the 90th percentile is dominated by TWIs which are private, prestigious, and selective. The TBIs are clustered from the 75th to 90th percentile, while the bulk of TWIs are below the 75th percentile. This implies that TBIs are generally more consistent performers in terms of institutional effectiveness in the production of black baccalaureates than are TWIs.

Salient Factors and Institutional Characteristics

The research review identified the most salient factors in persistence to a baccalaureate degree among black students. The author made note of the sample size, the statistical results, and the p value, in determining those factors which seem to have the most impact on persistence and institutional effectiveness. A shortcoming in this regard is that for each available study, the mean, standard deviation, and reliability of each variable was not published (Hunter, Schmidt, and Jackson, 1982).

In addition, all of the studies utilized are published in one form or another. Light (1982) reminds us that there is a publication bias. That is, several scientists have speculated that research findings of a relationship between variables that do not reach statistical significance are less likely, all other things equal, to be accepted for publication. Greenwald (1975) conducted a survey to determine if such speculation is grounded in fact. He surveyed both authors and reviewers of articles submitted to the *Journal of Personality and Social Psychology*. He found that researchers carrying out a study predict that their data will lead them to reject their null hypothesis. This is true 80 percent of the time. A second is that if a study leads to rejecting the null hypothesis of no treatment effect or no relationship between variables, researchers are more than eight times as likely to immediately submit their results for journal publication than if their study does not lead to rejection of the null hypothesis. A third is that if the findings from the first test of an hypothesis do not allow rejection of the null hypothesis, the average researcher is more than four times as likely to simply give up the problem than if the first findings allow the null hypothesis' rejection.

Overall, these survey results were very consistent between authors and reviewers. The results make a strong case to support the notion of a publication bias that reviewers need to keep in mind. A further caveat in the

research review conducted for this study on persistence and institutional effectiveness is that given time and budget constraints, the author selected only statistically significant findings in the published work.

Correlational studies served as the initial focal point for the 'modified' meta-analysis conducted by the author. Attention was paid to correlations and their p value ($p \leq .05$) in identifying salient factors. Next, factor analytic techniques were used to group the independent variables. Factor analysis of the salient independent variables yielded three categories of factors. These categories are defined as Institutional, Individual, and Contextual. Table 4.13 identifies these three categories, and also defines the factors in terms of their malleability.

Table 4.13: Most Salient factors in Persistence to the Baccalaureate Degree

FACTOR	
Institutional	Individual
1. Prestige	1. Female
2. Selectivity[a]	2. Parental Aid, TWI
3. Per-Student Expenditure[a]	3. High Socio-Economic Status[a]
4. Tuition[a]	4. Good H.S. Grades[a]
5. Traditionally Black Institution	5. Do Well on SAT, ACT[a]
6. Scholarships, Grants[a]	6. Good Study Habits[a]
7. Four-Year College	7. Live in Dormitory[a]
8. Size	8. Involvement[a]
9. Access[a]	
10. % Black Faculty[a]	
11. Private	
Contextual	
1. Northeast Region	
2. Attended Integrated High School[a]	
3. Litigation Status	

[a] Malleable

Source: Synthesis of research studies reported on in 'Research Review' chapter.

Of the eleven salient factors in the Institutional category, six are seen to have some degree of malleability. In the Individual category, of the eight salient factors, five are seen to have some degree of malleability. Of the three salient Contextual factors, one is seen to have some degree of malleability. Following Etzioni (1971), malleability refers to the degree to which the phenomenon a variable characterizes is "moveable". From a policy viewpoint, some variables are "given" or extremely difficult to change (sex), while others are relatively more changeable (income).

Next, in order to ascertain a possible relationship between the criterion of effectiveness, as measured by the EQ, and the predictor variables, a decision was made to test these relationships by computing Pearsonian correlations for the aggregate EQ for the five study years. These correlations were computed by the categories as delineated in the factor and the analytic technique described above. Table 4.14 provides the correlations for the Institutional category, Table 4.15 for the Contextual category, and Table 4.16 for the Individual category.

According to Table 4.14, the most powerful institutional predictors of institutional effectiveness for all years combined is attending a four-year college, followed by attending a TBI, access of black students to the institution, whether the student was supported by scholarships or grants, and the percent black faculty.

Reviewing Table 4.15, the most powerful contextual predictors of institutional effectiveness for all years combined are attending college in the Northeast and litigation status. These findings suggest that degree completion is more probable by attending college in the Northeast or a TBI in an Adams state.

According to Table 4.16, the most powerful individual predictors of institutional effectiveness for all years combined are involvement in campus life, good high school grades, parental aid for those attending TWIs, living in a dormitory, and high SES.

Table 4.14: Pearsonian Correlations of Effectiveness Quotient with Institutional Predictors—All Years Combined

Year	Variables[b]										
Criterion	Prestige	Selectivity	Per-Student Exp.	Tuition	TBI	Scholarship Grants	Four-Yr College	Size	Access	% Blk Fac	Private
EQ[a] Combined	.12	.14	.16	.07	.21	.18	.23	.14	.20	.17	.16
$p \leq .05$											

[a] EQ combined for 276 institutions for 1976-77, 1978-79, 1980-81.
[b] Variables derived from synthesis of 31 research studies.

Table 4.15: Pearsonian Correlations of Effectiveness Quotient With Contextual Predictors—All Years Combined

Year	Variables[b]		
Criterion	Northeast Region	Attended Integrated High School	Litigation Status
EQ[a] Combined	.36	.11	.24
$p \leq .05$			

[a] EQ combined for 276 institutions for 1976-77, 1978-79, 1980-81.
[b] Variables derived from synthesis of 31 research studies.

Table 4.16: Pearsonian Correlations of Effectiveness Quotient with Individual Predictors—All Years Combined

Year	Variables[b]							
Criterion	Female	Parental Aid, TWI	High SES	Good High School Grades	Do Well on SAT, ACT	Good Study Habits	Live in Dorm	Involvement
EQ[a] Combined	.21	.26	.24	.30	.14	.22	.25	.33
$p \leq .05$								

[a] EQ combined for 276 institutions for 1976-77, 1978-79, 1980-81.

[b] Variables derived from synthesis of 31 research studies.

For exploratory purposes, a stepwise regression method was employed in an attempt to isolate the most powerful set of predictors of institutional effectiveness in the production of baccalaureates. The observations made regarding the power of predictor variables should be regarded as primarily heuristic. The stepwise regression looked at the strongest factors by combining the institutional, individual, and contextual predictors. For all years combined, this analysis indicates that the most important predictor for institutional effectiveness is a contextual factor, that of attending school in the Northeast. An individual factor, involvement, also appeared, followed by good high school grades, and parental aid (TWIs). Institutional predictors of four-year college and attending a TBI also appeared, but they generally followed individual factors. For all salient predictors in the regression analysis, $p \leq .05$.

Next, a modified meta-analysis using effect sizes was conducted. If the null hypothesis is true, then the population correlation or effect size is in fact zero. If sample sizes are known for all studies, then the effect size can be estimated from either the proportion of positive results or from the proportion of positive significant results. Glass (1976) advances systematic quantitative procedures for integrating research findings across studies. The primary properties of Glass's meta-analysis are a strong emphasis on effect sizes rather than significance levels. Glass's argument is that research integration is more descriptive than inferential, and that the most important descriptive statistics are those that indicate clearly the magnitude of effects.

The initial product of Glassian meta-analysis is the mean and standard deviation of effect sizes across studies. His method also entails acceptance of the variance of effect sizes at face value. In essence then, the effect size is the difference between the means in standard score

form, that is, the ratio of the difference between the means to the standard deviation.

In an exploratory fashion, correlation coefficients across the relevant studies were combined. A caveat here is that consideration of only studies with statistically significant findings can lead to bias in the estimate of correlations or effect sizes. Another problem in combining evidence from different studies in the behavioral and social sciences is that there is usually no natural scale of measurement for social variables (Hedges and Olkin, 1983). Glass's suggestion of using the standardized mean difference and the correlation coefficient as the two most useful indices for behavioral and social sciences helps somewhat in analysis. However, some investigators have argued that this procedure may obscure real differences in the outcomes of studies conducted under different conditions.

In sum, the use of correlation coefficients as the index indicated the importance of region as a contextual effect, attending a four-year college, a private college, and TBI as institutional effects, and good high school grades, and high SES as individual effects. Again, the use of this modified meta-analysis should be regarded as exploratory and heuristic. However, it does provide some guidance as to the most salient predictors of persistence and institutional effectiveness.

Table 4.17 summarizes the research review in which effect sizes are determined for those factors found to be most salient in institutional effectiveness in the production of black baccalaureates. The magnitude of the effect size can also be used as a way to rank the factors in their order of importance. By both ranking the salient factors and determining their relative degree of malleability, a meaningful step can be taken in the direction of formulating policy objectives with the intended goal of addressing institutional effectiveness.

Table 4.17: Meta-Analysis

Factors	Effect Size M	SD	N
Institutional			
Attend 4-Year College	.41	.76	26
Attend a TBI	.45	.81	21
Access	.15	.48	9
Scholarship Aid	.27	.72	17
Percent Black Faculty	.31	.73	15
Attend Private College	.47	.86	23
Contextual			
Attend College in Northeast	.54	.91	11
Litigation Status	.42	.46	7
Individual			
Involvement	.31	.68	16
Good High School Grades	.51	.90	15
Parental Aid (TWIs)	.19	.39	17
Living in Dormitory	.30	.72	17
High SES	.42	.89	15

Note: M=Effect Size; SD=Standard Deviation; N=No. of Studies.

In rank order, the factors contributing the most to producing black graduates are attending college in the Northeast, good high school grades, attending a private college, attending a TBI, high SES, and attending a 4-year college.

Taking into account the foregoing analysis, the most consistent institutions in the production of baccalaureates over the 1972-73 to 1980-81 can be evaluated in terms of characteristics which enhance effectiveness. For all institutions that are most effective, half are in the Northeast, seven of ten are private, the majority charge tuition and fees over the average, all are residential rather than commuter institutions, four are in *Adams* states, only two are weak in terms of access, the majority have student populations of more than 500 and less than 10,000 most are prestigious and selective, with generous per student expenditures.

Among the top five TBIs over the study period, as expected all are in *Adams* states, three are private, two are considered prestigious and selective, all have student populations above 500 but less than 10,000, all have equal access for black students, and there is a majority of black faculty in each.

A review of the characteristics of the most effective institutions over the study period reveals a close correspondence between effectiveness and persistence predictors as reported in the statistical analysis. These findings are revealing and suggestive. The exploratory nature of this study should encourage others to examine the relationship between persistence and institutional effectiveness.

Type of Student Most Likely to Succeed

In this vein, the individual predictors, or factors, help shed light on the type of black student most likely to persist to degree completion. The foregoing analysis identifies such a student as possessing the following attributes: being a female, receiving parental aid (particularly those attending TWIs), being of high socio-economic status, having good high school grades, doing well on aptitude tests (such as SAT or ACT), possessing good study habits, living in dormitory (especially during the first year), and maintaining a high level of involvement with campus life.

Not possessing a majority of these factors does not imply failure. The TBIs have traditionally enrolled students not in possession of the majority of these factors. However, for many not in possession of a majority of these factors, the college experience has allowed them to excel and to acquire a critical number of these individual characteristics. The ongoing value of the TBIs is their ability to admit, retain, and graduate students who do not meet the ideal criteria noted above. A weakness in the TWIs, is that oftentimes black students not in possession

of a majority of these individual characteristics fall by the wayside.

Results of Tests

Ten specific hypotheses were stated earlier. The analysis of the data presented in various forms in Chapters 3 and 4 allows the author to summarize the acceptance or rejection of the hypotheses at this point. Again, the acceptance or rejection of each null hypothesis should be considered tentative.

Hypotheses

1. There is no difference in effectiveness between TBIs and TWIs.

   Finding: Reject. TBI > TWI

2. There is no difference in effectiveness between public and private colleges and universities.

   Finding: Reject. Private > Public

3. There is no difference in effectiveness between public TBIs and private TBIs.

   Finding: Reject. Private TBI > Public TBI

4. There is no difference in the percent of black faculty between colleges and universities that are more effective in graduating black students than those that are less effective.

   Finding: Reject. Larger % of black faculty => higher EQ score

5. There is no difference between more effective and less effective institutions in the likelihood of having special admissions programs.

   Finding: Reject. More effective more likely

6. There is no difference between more effective and less effective institutions in the likelihood of having a retention program.

   Finding: Reject. More effective more likely

7. There is no difference between more effective and less effective institutions in the quality of financial aid.

   Findings: Reject. More effective more likely.

8. SAT scores do not have a significant relationship to institutional effectiveness.

   Finding: Accept.

9. Student-faculty ratios have no relationship to institutional effectiveness.

   Finding: Accept.

10. Per student expenditures have no relationship to institutional effectiveness.

    Finding: Reject. Higher per student => more effective.

Of the ten null hypotheses, eight were rejected. The rejection of these null hypotheses leads us to believe that: (1) TBIs are more effective than TWIs in producing black baccalaureates; (2) private institutions are more effective than public institutions; (3) private TBIs are more effective than public TBIs; (4) institutions with a larger percentage of black faculty are more effective; (5) institutions with special admissions programs are more effective; (6) institutions with retention programs are more effective; (7) more effective institutions are more likely to have a higher quality of financial aid; and (8) institutions with higher per-student expenditures are more effective in producing black baccalaureates.

Chapter 5

POLICY IMPLICATIONS

For the foreseeable future, colleges and universities in the United States will be operating on the principle of little or no real growth. For many, survival will be the critical issue. Financial constraints and financial stress will serve as basic operational principles for higher education. This situation is particularly real for predominantly black institutions of higher education, witness the recent well publicized problems of Fisk University.

Colleges and universities under financial stress are most successful when they recognize the need for more effective resource use, promote long-range planning, identify priority programs and trim others, attract capable managers, improve fund-raising, and require greater trustee, faculty, and staff involvement (Campbell, 1982; Dickmeyer and Hughes, 1982). Policy-makers in predominantly black institutions often times find it difficult to engage in long-range planning when short-range problems dominate the agenda. Another problem for TBIs is that TWIs are often able to recruit more capable black managers due to higher salary schedules and other employment benefits.

The study reported here has attempted to conceptualize institutional effectiveness and to measure this phenomenon in relation to factors identified as salient in persistence to the degree on the part of black students. The statistical techniques represent an attempt to identify and rank the most salient factors in terms of their impact. Those variables, predictors or factors considered malleable were identified. Statistical and meta-analysis served to isolate effect sizes of the more malleable factors, thus ranking them. As Etzioni (1971) reminds us, the ranking of factors in terms of their malleability is important in itself. However, a general theory of malle-

ability is central to policy science. For policy studies should focus attention and research on the more moveable variables and on the conditions under which less movable ones can become more open to modification.

In this context, a concern is also what makes for an effective undergraduate institution in relation to producing black graduates? As seen earlier, factors contributing to institutional effectiveness can be classified as institutional, individual, and contextual. The methods employed in this research should allow for formulating a reasonable answer to this question. The policy implications suggested by both the societal and institutional analyses should be couched within a context of non-expansion in higher education.

Among the institutional factors, malleable variables include access, scholarships, grants, percent black faculty, per-student expenditure, selectivity, and tuition. From a policy viewpoint, knowledge, commitments, decisionmaking strategies, and power should continue to be devoted to increasing the access of black students to higher education, supported adequately by scholarships and grants, in institutions with a reasonable percentage of black faculty and adequate per-student expenditures.

The policy of the Reagan Administration is hampering the access of black students to higher education, and the progress of traditionally black institutions. Because of new regulations it will be considerably more difficult for many black and low income college students to continue their education, as well as for high school students to enter college. In addition, the Reagan Administration does not seem inclined to support the established guidelines for dismantling dual systems of higher education as mandated in Judge John Pratt's orders with respect to the *Adams* v. *Califano* case (Blackwell and Hart, 1982).

Among individual factors, the malleable variables in rank order include involvement, good high school grades,

living in a dormitory, high socio-economic status, good study habits, and good SAT, ACT scores. At the individual level, these findings imply structures that can encourage black students to become involved on both black and white campuses, to achieve academically in high school, to develop good study habits, and to perform well on aptitude tests. Socio-economic status is important in that higher SES black students tend to outperform lower SES black students. However, the overall median black family income has remained only around half that of the median white family income. This factor is malleable, however, it has become a difficult policy outcome to achieve given chronically higher rates of black unemployment and underemployment in the U.S. economy.

Among the contextual factors, attending an integrated high school is the single malleable variable. The *Brown* v. *Board of Education* decision has been the guiding legal framework for the 30 year policy debate and action in relation to desegregation and integration in education. Again, this factor is malleable, but it has proven to be a tough policy outcome to achieve.

Traditionally black institutions remain important in terms of providing access to higher education in an effective and efficient manner to tens of thousands of black students. Outside of private, four-year colleges located in the Northeast, TBIs remain, as a group, the most effective institutional type in producing black graduates. However, compared to the private, four-year Northeastern colleges, the TBIs graduate a significantly larger number of black students per year.

The broad issues discussed here suggest a need to develop and implement policies that can strengthen the education of black students at the elementary and secondary levels in order to allow them to prepare adequately for college as a post-high school option. At least eight commissioned reports have been issued recently on the broad

topic of how to improve elementary and secondary education in the U.S. This attention to the topic of elementary and secondary education is healthy. It implies an opening of the discussion as a policy question. More commitment, decision-making strategies, knowledge and power may be directed to the topic. A concern with improving elementary and secondary education stands to benefit black people at all levels of education.

A caveat in regards to making improvements in elementary, secondary, and higher education is in regard to projections for occupational gains and losses in the 1980s. The Bureau of Labor Statistics points to a projected loss in the 1980-1990 decade of 55,000 jobs for college and university teachers. This projected job reduction compares to a loss of 173,000 jobs for secondary-school teachers.

Retrenchment is with us for this decade at least. Professional and teaching ideals in the academy are going to be tested. Morale is declining, primarily due to feelings of exclusion, rather than for economic reasons. At the same time, the faculty is becoming more sensitive to the needs of undergraduates and the surrounding community.

The task of improving access to, and the performance level of, higher education will continue to be a difficult agenda item during the 1980's. This report is an attempt to identify, describe, and measure the most salient and malleable factors in persistence among black students, and to prescribe broad approaches for improving institutional effectiveness.

Colleges and universities are going to be seeing many more non-traditional undergraduate students. They will be older, more experienced, and a different type of undergraduate than many institutions are accustomed to. Facutly members are going to be doing more inter-disciplinary collaboration than many of them may be accustomed

to. Many faculty members will be spending more and more time outside of the academy.

The decade of the 1980's is going to be a time of turmoil and change for colleges and universities. The ideals of the profession are changing. Teaching ideals are changing. Continued knowledge, commitment, decision-making strategies, and power need to be applied to improving the access of black students to undergraduate education, and the effectiveness of institutions in graduating them, in spite of the difficult environment attendant to the higher education enterprise.

[Reference Materials Omitted in Printing]

ABOUT THE AUTHOR

Philip S. Hart currently is an Associate Professor of Sociology, College of Public and Community Service, University of Massachusetts-Boston, and a Visiting Research Sociologist, Center for AfroAmerican Studies at UCLA. He holds an M.A. and Ph.D in Sociology from Michigan State University and a B.A. from the University of Colorado-Boulder.

Hart has authored numerous articles, reports, research monographs, and two books. He also has a strong background in communications. He has produced several films which have been distributed widely. He also has served as a research consultant in studies of minorities in public broadcasting and television audience measurement. He has served as project director in many urban development programs specializing in work that affects the lives of inner-city residents.

[*Ed. Note*: The following affidavit was appended to the Southern University Board of Supervisors' motion for a stay in the district court pending post-trial motions and appeal.]

EXHIBIT C

AFFIDAVIT OF RUDY GORRELL STUDENT, SOUTHERN UNIVERSITY LAW CENTER

Rudy Gorrell, being duly sworn, deposes and says:

1. I am a third year student at the Southern University Law Center. This affidavit is submitted in support of Southern University Board of Supervisors' application to stay the enforcement of the judgment entered heretofore pending the hearing and determination of the Board's appeal to the United States Supreme Court or to such other court as may be appropriate.

2. I decided to pursue my legal training at Southern University Law Center because I felt it would afford me an unparralleled opportunity to obtain a law degree in an environment which was sensitive to my concerns, while at the same time challenging and stimulating enough to insure me a quality education.

My decision to attend the Southern University Law Center was a conscious, affirmative and considered decision, made to the exclusion of all other possibilities.

4. I did not and do not wish to attend the Louisiana State University Law Center. I do not know if I would gain admission to the LSU Law Center under its current admission standards. However, I do desire to become a practicing attorney.

5. If the court's order is allowed to take effect within the ordinary delays permitted by law, my studies at the Southern University Law School will be adversely affected

as I will be most concerned about the future of the school at which I am currently enrolled. I also fear that with the elimination of the Southern University Board of Supervisors, there will be no entity that can protect and advocate the interests of students like me.

6. I think it is necessary for this Court to stay the enforcement of the district court's order pending a decision on appeal so that I and other students enrolled at the Southern University Law Center may complete our studies for the upcoming academic year without the cloud of uncertainty hanging over our law school.

/s/ Rudy Gorrell

/s/ [Illegible]
Notary Public

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 80-3300
Section "A"

UNITED STATES OF AMERICA

v.

STATE OF LOUISIANA

[Filed August 10, 1987]

NOTICE OF APPEAL TO THE SURPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of Louisiana ex rel. William J. Guste, Jr., Attorney General of the State of Louisiana, a defendant herein, hereby appeals to the Supreme Court of the United States from the final orders of the United States District Court, Eastern District of Louisiana (Three-Judge Panel) invalidating and enjoining the enforcement of several constitutional and statutory provisions of the State of Louisiana with respect to the establishment and operation of four boards of higher education, abolishing said boards, and substituting in their place a court-created single governing board of higher education and further ordering the restraining of the entire system of higher education existing in Louisiana, including, but not limited to, abolishing and merg-

ing institutions, creating a community/junior college system, restricting degrees awardable by institutions of higher learning, and establishing new, stricter, and more selective admission standards at certain four-year universities, all contrary to several constitutional and statutory provisions of the State of Louisiana, such final orders having been entered on July 19, 1989, and August 4, 1989, together with the interlocutory order entered on August 2, 1988 and orders of August 4, 1989 supplementing the above final orders, denying motions for a new trial, and denying motions for a stay pending appeal.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted:

/s/ William J. Guste, Jr.
WILLIAM J. GUSTE, JR.
Attorney General of Louisiana
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CERTIFICATE OF SERVICE

I, William J. Guste, Jr., attorney for State of Louisiana ex rel. William J. Guste, Jr., Attorney General of the State of Louisiana, appellant herein, and a member of the Bar of the Supreme Court of the United States and of the Bar of the United States District Court in and for the Eastern District of Louisiana, hereby certifies that, on the 10th day of August, 1989, I served copies of the foregoing Notice of Appeal on the several parties herein, as follows:

1. On the United States, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to John Voltz, United States Attorney in and for the Eastern District of Louisiana, 500 Camp Street, New Orleans, Louisiana 70130, to Mr. Levern M. Younger, Attorney for the U. S. Department of Justice, Civil Rights Division, Educational Opportunities Litigation Section, P. O. Box 65958, Washington, D. C. 20035-5958, to Mr. Nathaniel Douglas and Mr. Franz Marshall, Attorneys for the U. S. Department of Justice, Civil Rights Division, Educational Opportunities Litigation Section, Washington, D. C. 20530, and to The Solicitor General, U. S. Department of Justice, Washington, D. C. 20530.

2. On Southern University Board of Supervisors, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to William Jefferson, Esq., JEFFERSON, BRIAN and GRAY, 650 Poydras Street, Suite 1850, New Orleans, Louisiana 70130.

3. On Board of Trustees for State Colleges and Universities, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to Robert Kutcher, Esq., BRONFIN, HELLER, STEINBERG AND BERINS, 650 Poydras Street, Suite 2500, New Orleans, Louisiana 70130.

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7. On John N. Kennedy, Special Counsel to the Governor, Office of the Governor, Fourth Floor, State Capitol, P. O. Box 94004, Baton Rouge, Louisiana 70804, and to Joseph J. Levin, Jr., and Carla Calobrisi, ADAMS, McCULLOUGH & BEARD, Attorneys at Law, 200 M. Street, N.W., Washington, D. C. 20036-3307, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to said persons at said addresses.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-3300
Section "A"

SOUTHERN UNIVERSITY BOARD OF SUPERVISORS,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that the Southern University Board of Supervisors hereby appeals to the Supreme Court of the United States from the final judgments of the Three-Judge District Court granting judgment in favor of the United States of America, entered on August 2, 1988, July 19, 1989 and August 4, 1989.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on the following counsel of record properly addressed by depositing same in the United States mail with sufficient postage prepaid on this 14th day of August, 1989.

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MOTION FILED
DEC 8 1989

Nos. 89-556, 89-557 and 89-771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF LOUISIANA, *ex rel.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,
Appellant,

STATE OF LOUISIANA, *ex rel.* CHARLES E. "BUDDY" ROEMER, GOVERNOR OF THE STATE OF LOUISIANA, *et al.*,
Appellants,

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Eastern District of Louisiana

---

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* URGING DISMISSAL OF THE APPEAL

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In the
Supreme Court of the United States
October Term, 1989

Nos. 89-556, 89-557 and 89-771

State of Louisiana, ex rel. William J. Guste, Jr., Attorney General of the State of Louisiana;

State of Louisiana, ex rel. Charles E. "Buddy" Roemer, Governor of the State of Louisiana, et al.;

Board of Supervisors of Southern University and Agricultural and Mechanical College,

Appellants,

v.

United States of America,

Appellee.

On Appeal from the
United States District Court
for the Eastern District of Louisiana

MOTION OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE URGING DISMISSAL OF THE APPEAL

The NAACP Legal Defense & Educational Fund, Inc., (LDF) respectfully moves the Court for leave to file the attached brief as amicus curiae supporting the position of the United States on the jurisdictional issue addressed herein.

The following parties have consented to the filing of this brief: the United States, the State of Louisiana (by the Governor), the Supervisors of Southern University A&M College, Board of Regents of the State of Louisiana, the Louisiana Board of Trustees for State Colleges and Universities, the Board of Supervisors of Louisiana State University and A&M College, and the Bossier Parish School Board. As of the time of filing this brief the Attorney General for the State of Louisiana has not granted consent.

LDF is a non-profit corporation organized under the laws of the State of New York. It was formed to assist

black citizens in securing their rights under the Constitution.[1]

This lawsuit raises important issues regarding the dismantling of formerly dual systems of higher education. LDF historically was involved in the major cases on this question that have been decided by this Court, and based on its experience believes that the law in this area should be developed upon full consideration by the Court with the benefit of intermediate appellate review in the Courts of Appeals.

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[1]Further description of the interest of amicus LDF appears at pages 2-5 of the attached brief, including a description of LDF's history of involvement in school desegregation litigation.

We respectfully submit that LDF's participation will be of assistance to the Court.

Respectfully submitted,

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Question Presented

Whether the Court lacks jurisdiction to entertain this direct appeal under 28 U.S.C. § 1253 where the case was not required to be heard by a panel of three judges because no state statute, law, or regulation was challenged, sought to be enjoined, or actually was enjoined on grounds of its repugnance to the Constitution.

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In the
Supreme Court of the United States
October Term, 1989

Nos. 89-556, 89-557 and 89-771

State of Louisiana, ex rel. William J. Guste, Jr., Attorney General of the State of Louisiana;

State of Louisiana, ex rel. Charles E. "Buddy" Roemer, Governor of the State of Louisiana, et al.;

Board of Supervisors of Southern University and Agricultural and Mechanical College,

Appellants,

v.

United States of America,

Appellee.

On Appeal from the
United States District Court
for the Eastern District of Louisiana

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS AMICUS CURIAE URGING DISMISSAL OF THE APPEAL

Interest Of The NAACP Legal Defense Fund As Amicus Curiae[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit corporation established to assist black citizens in securing their constitutional and civil rights. LDF historically has had and continues to have a major role in litigation efforts challenging discrimination and segregation in education.[2]

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[1]The Legal Defense Fund supports the position of the United States on the jurisdictional issue addressed herein.

[2]See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954). LDF represents plaintiffs in the litigation that resulted in the initiation of desegregation efforts in public higher education systems in 18 states, including the State of Louisiana. Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973), modified and aff'd unanimously en banc, 480 F.2d 1159 (D.C. Cir. 1973). Other LDF higher education desegregation cases have included: Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Adams v. Lucy, 228 F.2d 619 (5th Cir.), cert. denied, 351 U.S. 931 (1956); Meredith v. Fair, 305 F.2d 343 (5th Cir.), cert. denied, 371 U.S. 828 (1962); Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F. Supp. 784 (M.D. Ala. 1968), aff'd per curiam, 393 U.S. 400 (1969); Norris v. State Council of Higher Education for Virginia, 327 F. Supp. 1368 (E.D. Va.), aff'd mem., 404 U.S. 907 (1971); Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984), aff'd, 801 F.2d 799 (6th Cir. 1986).

Based upon this institutional commitment to the elimination of discrimination in education, LDF agrees with the district court below that a state has not fulfilled its affirmative obligation to dismantle its de jure racially dual higher education system where substantial vestiges of the de jure system persist, as the record demonstrates is the case in Louisiana with respect to, inter alia, student enrollment, employment of faculty and staff, distribution and development of academic programs, financing, and school facilities.[3] In light of this showing of a continuing violation, LDF strongly supports the adoption of a remedial plan adequate to assure that those victimized by continuing racial discrimination and its effects are made whole. Such a plan must formulate remedies that promise to increase educational opportunities for the

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[3]J.A. 291a-326a [United States' List of Material Facts to the Motion for Summary Judgment, filed May 13, 1988].

members of the class subjected to discrimination -- not limit them -- and courts supervising the remedial process must eschew ineffective or illusory remedies as well as devices that may harm and disadvantage black students in their attempts to surmount the dismal legacy of racially discriminatory education.

By virtue of its active participation in higher education desegregation suits, LDF has a significant interest in the instant appeal, and in particular LDF has a legitimate concern that the law in this area be developed upon a record that is subject to comprehensive review.[4]

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[4]This Court has emphasized that intermediate appellate review facilitates its consideration of important questions by helping to narrow and refine issues and by allowing full development and exploration of the legal theories underpinning a decision. See, e.g., Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 99 (1974) ("mediating wisdom of a court of appeals"); Florida Lime & Avocado Growers v. Jacobsen, 362 U.S. 73, 92-93 (1960) ("dominant principle of having this Court review decisions only after they have gone through two judicial sieves") (Frankfurter, J., dissenting).

Here, direct review from the district court's approval of the Special Master's report is not only contrary to law,[5] but also would be imprudent and likely to impair this Court's ability fully to consider and resolve the weighty issues framed in the Jurisdictional Statements. This case should first proceed in the Court of Appeals for the Fifth Circuit[6] and, in order to aid this Court's eventual jurisdiction over this matter, the stay issued by the Court should remain in effect during the pendency of appellate proceedings.

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[5]As argued infra at 14-28, the three-judge court was not "required" to hear this case and therefore the Court lacks jurisdiction to entertain this appeal.

[6]The appellants in this Court have all filed protective notices of appeal to the United States Court of Appeals for the Fifth Circuit.

Statement of Relevant Facts

1. Consideration Below Of The Jurisdictional Issue

To date no court has given full consideration to the propriety of empaneling a three-judge court in this case. When the case was filed in 1974, the United States requested that a three-judge court be convened pursuant to 28 U.S.C. §§ 2281 and 2284 (J.A. 184a). Without deciding the issue, the Chief Judge of the United States Court of Appeals for the Fifth Circuit designated the members of the special tribunal and directed that the three-judge court itself determine if the case was properly before it (J.A. 197a-98a). A three-judge district court was empaneled on April 16, 1974[7] but apparently failed to consider or resolve the question put to it by the Fifth Circuit.

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[7] United States v. Louisiana, 543 F.2d 1125, 1126 (5th Cir. 1976).

Despite the fact that the three-judge court was reconvened on three occasions after repeal of 28 U.S.C. § 2281 in 1976,[8] the propriety of the three-judge court was not disputed, or even seriously addressed, by the parties or the court prior to the instant appeal.[9]

However, in 1976 the Fifth Circuit exercised jurisdiction over an interlocutory appeal from a ruling of the three-judge district court in this case denying a petition for intervention. In so doing, the Fifth Circuit overruled its prior decision in Weiser v. White, 505 F.2d 912 (5th Cir. 1975), requiring such appeals to proceed directly to this Court. The decision was based upon this Court's narrowing of the scope of review of three-judge

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[8]See Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119, § 7 (1976).

[9]The issue was addressed in passing in 1988: one sentence appears in the district court opinion, without analysis or citation, stating simply that the request for a three-judge court had been properly made in this case (J.A. 10a).

court cases under 28 U.S.C. § 1253, and in particular upon MTM v. Baxley, 420 U.S. 799 (1975), where the Court ruled that a direct appeal would lie only where the order of the three-judge court rested on constitutional grounds. Thus, the Fifth Circuit previously exercised jurisdiction over an appeal from a non-constitutionally based decision in this case in 1976 -- and it did so again in 1981.[10]

2. Allegations Of The Complaint Affecting Jurisdiction

Neither the original Complaint filed in this case in 1974 nor the Amended Complaint filed in 1980 challenge any state law, statute, or regulation as unconstitutional (J.A. 153a-65a, 166a-81a). Instead, both allege that "acts and practices" of state officials maintain and perpetuate

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[10]United States v. Louisiana, 543 F.2d 1125 (5th Cir. 1976); United States v. Louisiana, 669 F.2d 314 (5th Cir. 1982)(denial of a petition for intervention).

the dual system previously mandated by state law (J.A. 162a, 176a). Similarly, no request was made to enjoin any state statute or law on grounds that it violated the Constitution (J.A. 162a-63a, 177a).

The gravamen of the Complaint is a challenge to state practices by multiple state officers acting under the authority of state laws themselves left unchallenged. Indeed, in its Memorandum in Support of The Request for A Three-Judge Court, the United States expressly acknowledged that its "Complaint . . . seeks relief . . . which will enjoin the practices of the State of Louisiana as applied and interpreted by the defendants and their agents" (J.A. 193a-94a)(emphasis added). The "Complaint alleges that the defendants and their agents have failed in their affirmative duty to provide specific measures and timetables to eliminate [the racial] dualism" (J.A. 195a).

3. Basis For The Relief Ordered Below

When, in 1981, the parties agreed on a settlement and the court below approved it, no state statute, law, or regulation was stricken or limited in enforcement (J.A. 199a-255a, 256a-66a).

Although in 1989 the State itself advocated a remedial plan, which the court below approved, that substantially restructured Louisiana's higher education system,[11] neither the State nor any other party contended that the supersession of numerous existing provisions of Louisiana law necessary to accomplish that goal should be directed because any of such provisions were repugnant to the federal Constitution.[12]

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[11]See Appendix to Jurisdictional Statement of Governor Roemer, at 25a-31a.

[12]The Southern University Supervisors objected to the plan (J.A. 721a-29a), and the United States "remain[ed] skeptical that the record in this case [could] support the finding that a single board is warranted or that it will enhance desegregation" (J.A. 603a; accord (continued...)

The remedial order entered below is grounded solely upon a federal statute -- Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq. The district court expressly declined to reach the issue whether the United States had standing to sue under the Fourteenth Amendment, concluding that "whatever relief is available to a private plaintiff in a school desegregation suit under the Fourteenth Amendment is available to the United States under Title VI" (J.A. 17a, 84a).[13]

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[12](...continued)
J.A. 1077a). The State never argued that existing Louisiana law violated the federal Constitution.

[13]While there is language in the district court's opinions that invokes the Constitution as the basis for striking the multiple board system (e.g., J.A. 45a), it is clear from the collective opinions of the court, and emphasized in its Reasons for Ruling (August 4, 1989) (J.A. 84a), that the judgment below rested on statutory grounds. Because it concluded that the substantive standard under Title VI was the same as that under the Fourteenth Amendment (J.A. 17a, 22a, 24a), the court in its opinions referred to the Constitution and Title VI interchangeably.

SUMMARY OF THE ARGUMENT

The appeal from the district court's decision must proceed initially in the Court of Appeals for the Fifth Circuit, not this Court. Because the case was not one "required by any Act of Congress to be heard and determined by a district court of three judges," the three-judge court was improperly empaneled and therefore the requirements for direct appeal under 28 U.S.C. § 1253 are not satisfied.

A three-judge court may be convened properly under Section 2281 only if the complaint raises a federal constitutional challenge to an identified state law or regulation and requests that enforcement of the state law or regulation be enjoined on the ground of its repugnance to the federal Constitution. Morales v. Turman, 430 U.S. 322 (1977) (per curiam); Costello v. Wainwright, 430 U.S. 325 (1977) (per curiam); Baxter v. Palmigiano, 425 U.S.

308 (1976); Butler v. Dexter, 425 U.S. 262 (1976) (per curiam). No such challenge was raised here (J.A. 153a-83a.); thus, a three-judge court should never have been empaneled and most assuredly should not have been reconvened once it became clear that it had been improperly empaneled at the outset.

Moreover, the correct procedure in cases raising both constitutional and non-constitutional claims is to have a single judge make an initial determination of the statutory issues -- which may obviate the need to convene a three-judge court. Hagans v. Lavine, 415 U.S. 528, 543-44 (1974); Rosado v. Wyman, 397 U.S. 397, 403 (1970). Had this procedure been followed in the instant case, there would have been no need to convene a three-judge district court.

This conclusion is bolstered by the fact that the three-judge court here was convened and reconvened

ultimately to render a decision resting only on statutory grounds, Title VI (J.A. 17a). The Court has held that a three-judge court is not required in these circumstances. MTM, Inc. v. Baxley, 420 U.S. 799 (1975); Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974).

This appeal should proceed in the Court of Appeals for the Fifth Circuit and the stay issued by this Court should, pursuant to the All Writs Act, 28 U.S.C. § 1651, remain in effect during the pendency of appellate proceedings.

ARGUMENT

A. The Court Lacks Jurisdiction To Entertain This Direct Appeal Because The Case Was Not Required To Be Heard By A Three-Judge Court As No State Law Was Challenged Or Enjoined on Constitutional Grounds.

The Jurisdictional Statements rely on 28 U.S.C. § 1253 as the basis for this Court's jurisdiction of these

appeals. That section allows direct appeals to this Court from an order granting or denying an interlocutory or permanent injunction in any civil action "required by any Act of Congress to be heard and determined by a district court of three judges." (Emphasis added.) This Court's appellate jurisdiction under Section 1253 turns on whether the three-judge court was correctly convened.[14]

1. Appellants apparently contend that 28 U.S.C. § 2281 required this case to be heard by three judges.[15]

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[14]Gonzalez v. Automatic Employees Credit Union, 419 U.S. at 95 n.12.

[15]Section 2281 was repealed by Congress in 1976 but remains applicable to actions commenced before the date of repeal. Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119, § 7 (1976). It provided that

> an interlocutory or permanent injunction restraining the enforcement . . . of any State statute . . . shall not be granted by any district court or judge thereof upon the ground of unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges.

The statute is to be strictly construed. Allen v. State Board of (continued...)

However, this Court has unanimously held that Section 2281 required a three-judge court only where the initial pleadings framed a challenge to a specific state law provision on constitutional grounds[16] and requested an injunction against enforcement of an identified state law or regulation on constitutional grounds.

In Costello v. Wainwright, 430 U.S. 325 (1977) (per curiam), the Court held:

> The applicability of § 2281 as written turns on whether a state statute is challenged to be unconstitutional, not on whether an equitable remedy for unconstitutional state administrative behavior ultimately impinges on duties imposed under concededly constitutional state statutes.

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[15](...continued)
Elections, 393 U.S. 544, 561 (1969); Phillips v. United States, 312 U.S. 246, 251 (1941).

[16]The challenge must be based upon a provision of the Constitution other than the Supremacy Clause. Swift & Co. v. Wickham, 382 U.S. 111 (1965).

Id. at 326.[17] Likewise in Morales v. Turman, 430 U.S. 322 (1977) (per curiam), the Court emphasized that the threshold requirements for convening a three-judge court must be satisfied in the complaint, which must contain (1) a specific challenge to a state statute, rule or regulation, and (2) a request for an injunction against the enforcement of an identified law.[18] In rendering this holding in Morales, the Court relied on a decision reached a year earlier in Baxter v. Palmigiano, 425 U.S. 308 (1976).[19] Morales, 430 U.S. at 323 (citing Baxter,

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[17]In Costello this Court rejected the contention that a three-judge court was required because equitable relief for prison overcrowding might require suspending or superseding a state statute.

[18]The Court in Morales reversed a ruling that a three-judge court was required because a constitutional challenge to inhumane conditions maintained by state officials in Texas juvenile correctional facilities was effectively a challenge to a state-wide policy.

[19]Baxter involved a challenge to the denial of counsel and the use of a prisoner's silence against him in a prison disciplinary proceeding. The Court found that despite the fact that the state had detailed regulations governing prison disciplinary proceedings, the regulations did not address the right to counsel or the use of an (continued...)

425 U.S. at 313 n.2);[20] accord Butler v. Dexter, 425 U.S. 262 (1976) (per curiam).[21]

The record in this case makes clear that this threshold requirement was not met. Neither the original Complaint nor the Amended Complaint challenged any identified state constitutional provision, statute or regulation, nor was there any request to enjoin the enforcement of any identified state law (J.A. 153a-

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[19](...continued)
inmate's silence. "[The] complaint did not mention or challenge any rule or regulation of the Authority; nor did it seek an injunction against the enforcement of any identified rule." Baxter, 425 U.S. at 313 n.12. Thus, the Court concluded that a three-judge court was not required. Id.

[20]In the instant matter, had the Complaint in 1974 challenged the constitutionality of some provision of Louisiana law that purported explicitly to require racial segregation in the state's higher education system, a three-judge court still would not have been "required." Bailey v. Patterson, 396 U.S. 31 (1962)(where unconstitutionality is beyond dispute, single judge may enjoin state law).

[21]In Butler the Court held that it lacked jurisdiction of an appeal from an injunction granted by a three-judge court where local officials had acted unconstitutionally in using a state statute as a pretext for arrest and where no question of the constitutionality of the underlying statute was presented to the three-judge court.

183a). The United States' request for a three-judge court was admittedly founded not upon a direct attack to a state law on constitutional grounds, but rather on a claim that defendants' "acts and practices" in carrying out their duties were unconstitutional (J.A. 191a).

The State, through Governor Roemer, makes several novel arguments to support its claim that this Court does have direct appellate jurisdiction. For example, the Governor argues that this case is within the parameters of Section 2281 because it is a suit seeking to interpose the Constitution against enforcement of delegated legislation, in the form of the Board of Regents' Master Plan (Jurisdictional Statement of Governor Roemer at 11-12). The argument will not withstand scrutiny. The United States' specific complaint about the Master Plan was that it "fails to address the dismantling of the State's racially dual system of higher

education" (Appendix to Jurisdictional Statement of Governor Roemer [hereafter Roemer Appendix] at 69a).[22] Thus the challenge raised here is very much like that made in Costello, where effectively it was the absence of a policy that caused the condition that offended the Constitution.[23]

Here the Complaints allege that the absence of an affirmative policy to dismantle the dual system, combined with numerous decisions of the multiple administrative decision makers, creates the constitutionally offensive condition. The Complaints focus throughout on the establishment of the dual system and allege that the defendants have failed in their affirmative duty to provide

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[22]The 1974 Complaint identifies the Master Plan as simply a proposal (J.A. 162a). It clearly was not a statute or regulation, nor was it being challenged as such.

[23]Plaintiffs in Costello challenged the State's failure to provide medical services to prisoners and to deal adequately with overcrowding. See Costello v. Wainwright, 539 F.2d 547 (5th Cir. 1976).

specific measures and timetables to eliminate the continuing vestiges of that system (J.A. 162a [¶ 26], 177a [¶ 35]). The Complaints do not challenge as unconstitutional any policies or regulations of the Board of Regents (whether contained in its Master Plan or not), or of any other defendant, either on their face or as applied.[24]

This case thus is not about any particular policy or regulation, but rather about the cumulative effect of

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[24]Quoting ¶ 33 of the Amended Complaint, where the United States alleges that the Regents' Master Plan "would maintain and perpetuate the dual system of public higher education based upon race," the Governor characterizes the Master Plan as the equivalent of delegated legislation. (Jurisdictional Statement of Governor Roemer at 12 n.16.) However, while adoption of the Master Plan may not require legislative approval, implementation of its provisions is dependent upon appropriations decisions made by each session of the Louisiana Legislature, which determines whether or not to accept the recommendations of the Board of Regents. (See J.A. 317a-18a [United States' List of Material Facts to the Motion for Summary Judgment, ¶¶ 141-43, 147](referring to Board of Regents' funding recommendations and to disparities in legislative appropriations to historically white and black institutions); J.A. 119a, 122a [1974 Louisiana Constitution, Article VIII, §§ 5(D)(4), 11, 12](Board of Regents recommends funding formula but the Legislature makes discrete appropriations directly to individual institutional governing boards).)

scores of individual decisions by the Governor (who appoints members to the Board of Regents and the three institutional boards) and by each of these bodies which, collectively, perpetuate the State's dual system and thereby violate the Constitution (see Roemer Appendix at 66a-68a).

The State, through the Governor, also misconstrues the record in asserting that the United States directly challenged the 1974 Louisiana Constitution as violative of the federal Constitution (Jurisdictional Statement of Governor Roemer at 13). Relying on selected excerpts from the United States' Interrogatory Responses, the State attempts to construct a direct challenge to its Constitution which (1) does not appear in the original or amended Complaint in this case, and (2) is inconsistent with the United States' position that it is the action and inaction of the numerous decision-making

bodies (admittedly created by the State's Constitution), not their mere existence, that offends the Constitution (Roemer Appendix at 66a-68a). There is in this litigation no direct challenge to the State's Constitution or statutory provisions.

The State's attempt (again through the Governor) to distinguish Costello and Morales also is unavailing. Like Morales, there is no central body of written regulations or policies challenged by the United States in this case and, like Costello, it is the defendants' failure to act under the circumstances -- not the presence of any particular offending regulation or state policy -- that causes the violation.

Costello, Morales, Baxter, and Butler solidly establish that challenges, such as those made here, to multiple unwritten policies or practices of state officials in implementing their duties under state law, are not

required to be determined by a three-judge court. Thus the initial empaneling of the three-judge court was improper.

2. Moreover, when the case was reactivated after the Morales, Costello, Baxter, and Butler cases were decided in 1976 and 1977, the three-judge court should not have been reconvened as it was undoubtedly improper at that time.[25]

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[25]Evolution of three-judge court jurisdiction to its current narrow application grew out of a recognition by this Court and the Congress that the policy behind three-judge courts -- "saving state and federal statutes from improvident doom at the hands of a single judge," MTM, Inc. v. Baxley, 420 U.S. 799, 804 (1975), had become largely anachronistic. See Swift & Co. v. Wickham, 382 U.S. 111, 128-29 (1965) (noting that the three-judge procedure dislocates "the normal structure and function of the lower federal courts," "expands this Court's obligatory jurisdiction," and "contradicts the dominant principle of having this Court review decisions only after they have gone through two judicial sieves") (quoting Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 92-93 (1960) (Frankfurter, J. dissenting)). See also S. Rep. No. 94-202, 94th Cong., 2d Sess., 3-8, reprinted in 1976 U.S. Code Cong. & Admin. News 1988, 1990-96 (finding that the original rationale that gave rise to the three-judge court concept in 1910 had virtually disappeared). Thus, even before repeal of Section 2281 by the Congress, the Court increasingly limited three-judge court jurisdiction. E.g., Phillips v. United States, 312 U.S. 246 (1941); Swift & Co. v. Wickham, 382 U.S. 111 (1965); (continued...)

B. The Case Was Not Required To Be Heard By A Three-Judge Court Because A Single Judge Should Have Initially Resolved The Statutory Claim And Obviated Any Need For A Three-Judge Court.

In Hagans v. Lavine, 415 U.S. 528 (1974), decided on March 25, 1974, prior to the initial empaneling of the three-judge court in this case, the Court approved as "accurately reflecting recent jurisprudence" the practice of having a single judge initially determine the substantiality of the constitutional claim (as noted above, the threshold prerequisite for applicability of § 2281) and then resolve any statutory claims, convening a three-judge court thereafter and only if the case could not be disposed of on non-constitutional grounds.[26] Accord Rosado v.

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[25](...continued)
Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974); MTM, Inc. v. Baxley, 420 U.S. 799 (1975).

[26]The Court in Hagans acknowledged that its holding "may appear at odds" with two prior opinions, Brotherhood of Locomotive Engineers v. Chicago, R.I. & P.R., 382 U.S. 423 (1966) and Florida (continued...)

Wyman, 397 U.S. 397, 403 (1970) (resolution of statutory claim initially by a single judge would avoid consuming the time of three federal judges in a matter not required to be determined by a three-judge court).[27] Under these precedents, the three-judge district court should have never been convened in this case.

This conclusion is further supported by the fact that the three-judge court was reconvened in order to reach a judgment that rests exclusively upon non-

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[26](...continued)
Lime & Avocado Growers v. Jacobsen, 362 U.S. 73 (1960), but it declined to follow them because it concluded that the Hagans holding "accurately reflects the recent evolution of three-judge-court jurisprudence." Hagans, 415 U.S. at 543-44. Both those earlier cases cited, however, do satisfy the threshold requirement (not met here) of a facial challenge to a state statute on constitutional -- non-Supremacy Clause -- grounds.

[27]In Philbrook v. Glodgett, 421 U.S. 707, 712 n.8 (1975), the Court excused the district court's failure to follow the procedure approved in Hagans because the complaint raised only constitutional claims and the statutory claim arose for the first time at oral argument before the three-judge court. Accord Alexander v. Fioto, 430 U.S. 634, 636 nn.6 & 7 (1977) (only basis of claim set out in the complaint was unconstitutionality of a statute).

constitutional grounds. See supra note 13. The Court has ruled repeatedly that a three-judge court is not required to render a ruling on a non-constitutional challenge to state law. Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974), holds that denial, on non-constitutional grounds, of a requested injunction against a state law need not be issued by a three-judge court. Similarly, the Court ruled in MTM, Inc. v. Baxley, 420 U.S. 799 (1975), that a direct appeal under Section 1253 from the denial of an injunction was proper only where the three-judge court's order was based on the merits of a constitutional claim.[28]

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[28]See also United States v. Texas, 523 F. Supp. 703, 724-28 (E.D. Tex. 1981) (district court declined to request a three-judge court in action initiated prior to repeal of § 2281 where there was no direct attack on the constitutionality of a state statute and the court concluded it would be inappropriate to expand the parameters of § 2281 in light of the repeal); Bradley v. School Board of City of Richmond, 324 F. Supp. 396, 398 (E.D. Va. 1971) (district court declined to request a three-judge court because even if the relief ordered would require non-compliance with a state law, "such an (continued...)

Thus, a three-judge court was not "required" for the purpose of rendering the orders below and direct appeal under Section 1253 does not lie.

CONCLUSION

For these reasons, LDF urges the Court to dismiss this appeal and direct that the parties seek review in the United States Court of Appeals for the Fifth Circuit. LDF also urges the Court to exercise its authority under

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[28](...continued)
injunction would not necessarily be 'upon the ground of the unconstitutionality of such statute'"); accord United States v. Louisiana, 543 F.2d 1125 (5th Cir. 1976).

the All Writs Act, 28 U.S.C. § 1651, to maintain its stay of the district court's order during the pendency of the appellate proceedings.

Respectfully submitted,

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Nos. 89-556, 89-557, and 89-771

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF LOUISIANA, EX REL. WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA, APPELLANT

v.

UNITED STATES OF AMERICA

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, APPELLANT

v.

UNITED STATES OF AMERICA

STATE OF LOUISIANA, EX REL. CHARLES E. "BUDDY" ROEMER, III, ET AL., GOVERNOR OF LOUISIANA, APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO DISMISS

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QUESTION PRESENTED

Whether the action filed by the United States against the State of Louisiana and others required the convening of a three-judge district court under 28 U.S.C. 2281 (1970) (repealed 1976), thereby vesting this Court with appellate jurisdiction under 28 U.S.C. 1253.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-556

STATE OF LOUISIANA, EX REL. WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA, APPELLANT

v.

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v.

UNITED STATES OF AMERICA

No. 89-771

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v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO DISMISS

OPINIONS BELOW

The opinion of the district court (J.S. App. 3a-38a) is reported at 692 F. Supp. 642.[1] The opinion of the district

[1] "J.S. App." refers to the joint appendix to the jurisdictional statements in Nos. 89-556 and 89-557, unless otherwise indicated.

court approving the remedial plan (J.S. App. 39a-77a) is reported at 718 F. Supp. 499. The opinion of the district court on motions to alter or amend the judgment (J.S. App. 81a-104a) is reported at 718 F. Supp. 525. The opinion of the district court on motions to stay, together with its supplemental order (J.S. App. 78a-80a, 105a-108a), are reported at 718 F. Supp. 521.

JURISDICTION

The judgment of the district court was entered on August 4, 1989. J.S. App. 78a-80a. The notices of appeal in Nos. 89-556 and 89-557 were each filed on August 10, 1989. J.S. App. 1157a-1160a, 1161a-1163a. The notice of appeal in No. 89-771 was filed on September 29, 1989. 89-771 J.S. App. 210a-212a. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.[2] For the reasons stated, see pp. 14-19, *infra*, this Court lacks jurisdiction over these appeals.

STATEMENT

1. a. In 1974, after the United States Department of Health, Education, and Welfare had notified the State of Louisiana that, in the Department's view, it was operating a racially segregated system of higher public education, the Attorney General of the United States filed this action in the Middle District of Louisiana under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and the Fourteenth Amendment. The complaint named the State

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[2] Section 1253 provides in pertinent part that

> any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

and the State's several boards of higher education as defendants. As relief, the United States sought an order enjoining the defendants from maintaining the State's segregated system and an order requiring them "to develop, submit and implement detailed plans which promise realistically and promptly to eliminate all vestiges of a dual system of higher education existing within the State of Louisiana." J.S. App. 163a; see *id.* at 9a-10a.

Along with the complaint, the United States filed a formal request that the district court convene a three-judge court under 28 U.S.C. 2281 (1970) (repealed 1976) and 28 U.S.C. 2284.[3] See J.S. App. 184a-196a. That request was granted in March 1974. See *id.* at 197a-198a. After the restructuring of the State's higher education boards in 1976,[4] the parties jointly moved to substitute the following

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[3] 28 U.S.C. 2281 (1970) provided in pertinent part:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute * * * shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Congress, by the Act of Aug. 12, 1976, Pub. L. No. 94-381, § 1, 90 Stat. 1119, repealed 28 U.S.C. 2281. That repeal does not affect this case because the complaint was filed before the repeal's effective date, August 12, 1976. See Act of Aug. 12, 1976, Pub. L. No. 94-381, § 7, 90 Stat. 1120; see also *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27, 29 n.1 (1980).

[4] In 1974, Louisiana established the current four-board system for governing the State's public colleges and universities. See La. Const. of 1974, Art. 8, §§ 5-7. The Board of Regents "has general responsibility for planning, coordinating and reviewing the budgets and academic program offerings of each state university." J.S. App. 40a. The remaining three boards, the Board of Supervisors of Southern

defendants: appellant Board of Regents, appellant Board of Supervisors of Southern University and Agricultural and Mechanical College (Southern Board), appellant Board of Trustees for State Colleges and Universities (State College Board), and appellant Board of Supervisors of Louisiana State University and Agricultural and Mechanical College (LSU Board). *Id.* at 10a.[5]

In August 1980, the district court, with the parties' consent, transferred the case to the Eastern District of Louisiana under 28 U.S.C. 1404(a). Trial was scheduled for September 1981. J.S. App. 10a.

University and Agricultural and Mechanical College, the Board of Trustees for State Colleges and Universities, and the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, each have "direct management authority for a number of" those state schools. *Ibid.*

The Board of Supervisors of Southern University oversees the following Southern University campuses – Southern at Baton Rouge, Southern at New Orleans, and Southern at Shreveport/Bossier City. The Board of Trustees for State Colleges and Universities oversees the following state schools – Louisiana Tech, Grambling State, University of Southwestern Louisiana, Northeast Louisiana, Northwestern State, Southeastern State, McNeese State, Nicholls State, and Delgado Community College. The Louisiana State University Board of Supervisors overseas the LSU system of colleges, including LSU at Baton Rouge, LSU at Shreveport, LSU at Alexandria, LSU at Eunice, and the University of New Orleans. See J.S. App. 40a-41a.

[5] In No. 89-556, the Attorney General of the State of Louisiana has filed a jurisdictional statement on behalf of defendant/appellant State of Louisiana. In No. 89-557, the Southern Board has filed its own jurisdictional statement. And in No. 89-771, the Governor of the State of Louisiana has filed a jurisdictional statement on behalf of the following defendants/appellants: the State, the Board of Regents, the State College Board, and the LSU Board. We will refer to the jurisdictional statement in No. 89-556 as "Att'y Gen. J.S.," the jurisdictional statement in No. 89-557 as "Southern J.S.," and the jurisdictional statement in No. 89-771 as "Gov. J.S."

5. In anticipation of trial, the parties developed a comprehensive record. The record showed that the State had segregated its colleges "[u]p to at least 1954" and continued the schools' racial exclusivity through the mid-1960s. J.S. App. 5a. Although the State had implemented an "open admissions" policy that permitted students of both races to attend all schools, the student enrollment and faculty employment pattern of Louisiana's colleges, as of 1973, remained segregated:[6]

School	% black students	% black faculty
historically white schools		
LSU system	7.7	1.6
Louisiana Tech. Univ.	6.2	0.0
McNeese State	8.4	0.5
Nicholls State Univ.	5.5	2.1
Northeast Louisiana Univ.	9.3	1.7
Northwestern Louisiana Univ.	10.2	1.6
Southeastern Louisiana Univ.	4.2	0.7
Univ. of Southwestern Louisiana	8.3	3.2
historically black schools		
Southern Univ. system	99.3	87.2
Grambling State	99.1	77.7

See J.S. App. 164a-165a.

Depositions were also taken of experts who had considered the effect of the State's dual system on educational concerns such as academic offerings, physical facilities, and apportionment of resources among the various state

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[6] The record also showed that, as of 1981, the membership of appellants LSU Board and State College Board was predominantly white, while that of appellant Southern Board was predominantly black. J.S. App. 44a

schools. Those experts concluded that the State, together with appellant Boards, had created the following inequalities under the dual system they had perpetuated: (1) historically white colleges received more desirable and better conditioned physical facilities than historically black colleges; (2) historically white colleges obtained superior and more diverse academic programs than historically black colleges;[7] and (3) current financial assistance formulas maintained, and did not eliminate, the unequal effect of past funding deficits at historically black colleges.[8]

In other words, segregation in Louisiana's higher education accomplished not only the separation of students by race, but also created inequalities in educational opportunities. Those inequalities, together with the proximate placement of black and white schools with overlapping curricula, continued the racial identifiability of the State's schools, and discouraged white students from attending the traditionally black schools, even after the State abolished formal segregation in the wake of *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954). See, *e.g.*, J.S. App. 44a, 670a, 689a.

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[7] In this regard, one expert noted that the academic offerings at white colleges located near historically black schools were not only better, but also duplicated the course offerings at those black schools. See C. Conrad, Louisiana Curriculum Analysis (Mar. 30, 1981), filed with Deposition of Clifton F. Conrad (Apr. 13, 1981).

[8] See generally C. Conrad, Louisiana Curriculum Analysis (Mar. 30, 1981), filed with Deposition of Clifton F. Conrad (Apr. 13, 1981); H. Kaiser, Facilities Evaluation of Eight Institutions of Higher Education of the State of Louisiana (Mar. 10, 1981), filed with Deposition of Harvey Kaiser (Apr. 7, 1981) and Affidavit of Harvey Kaiser (May 6, 1988); L. Leslie, The Financial Conditions of Historically Black and Comparable Louisiana Institutions of Higher Education (Mar. 23, 1981), filed with Affidavit of Larry L. Leslie (May 9, 1988).

2. a. After extensive briefing and lengthy pretrial conferences, the United States and appellants entered into a consent decree. The district court approved the decree in September 1981, concluding that it "embodies a reasonable and specific system-wide desegregation plan which promises realistically to work." J.S. App. 266a. Under the consent decree, see *id.* at 199a-255a, the State agreed to take the following remedial measures: (1) increase other-race membership on the four governing boards, appellants Board of Regents, Southern Board, State College Board, and LSU Board; (2) recruit other-race students to historically white and black schools through open admissions, increased information and recruitment campaigns, and additional student financial assistance; (3) increase faculty integration and provide educational opportunities to blacks in order to increase the number of black faculty members; and (4) increase faculty and student exchange programs and cooperative degree programs between historically white and black schools located near each other. See *id.* at 199a-220a.[9] The consent decree also committed the State to placing new academic programs at the historically black schools, *id.* at 222a-228a, as well as making significant capital improvements and increasing financial support for those schools, *id.* at 228a-231a.[10]

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[9] For example, Grambling and Louisiana Tech are located in Lincoln Parish. LSU's Baton Rouge campus is near Southern's Baton Rouge campus, as are LSU's and Southern's respective schools in New Orleans.

[10] Parts IV and V of the decree specifically provided that the decree (and the court's jurisdiction over the action) would expire on December 31, 1987, unless a party filed a motion before that date "either to seek compliance with [the decree] or to seek other relief necessarily implicating [the decree] * * *." J.S. App. 235a; see *id.* at 11a.

b. As of late 1987, six years after the decree had been entered, the student enrollment figures for the state colleges had scarcely changed. Grambling remained 98.5% black, and Southern's Baton Rouge campus remained 86% black. With two exceptions,[11] all the former historically white schools remained over 80% white. See J.S. App. 7a; see also p. 5, *supra*. The three governing boards, appellants Southern Board, LSU Board, and State College Board, also remained racially identifiable. See J.S. App. 661a; note 6, *supra*. The State had spent only $34 million of the $125 million earmarked for capital improvements, and had failed fully to fund other financial and academic aspects of the decree. See J.S. App. 364a. In these circumstances, the United States was of the view that the State and appellant Boards had not fully eliminated the vestiges of segregation. And in light of the continuing inequalities between the historically white and black schools and the proximate placement of such schools with overlapping curricula, the United States considered that students in Louisiana did not have a truly "unfettered choice" of where to attend school. See *Bazemore* v. *Friday*, 478 U.S. 385, 407 (1986).

c. In late December 1987, the United States therefore exercised its right under the consent decree and filed a motion with the district court that requested "a hearing * * * for the purpose of determining whether [appellants] have fully implemented all provisions of [the decree] and are operating the [Louisiana state] system of public higher education on a unitary basis." J.S. App. 267a. Appellant Southern Board, although aligned as a defendant in the action, joined the United States' motion, contending,

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[11] Northwestern State's student body had become 66% white; the University of New Orleans' student body had become 75% white. See J.S. App. 7a; see also p. 5, *supra*.

among other things, that the State had not fulfilled "its commitment [under the decree] to enhance predominantly black institutions," had not satisfied "the equal opportunity provisions of the decree," and had not "otherwise implemented [the decree] in good faith." *Id.* at 563a.

In lieu of an evidentiary hearing, the parties submitted "hundreds of pages of briefs and exhibits," and filed cross-motions for summary judgment on the issue of liability. J.S. App. 4a.

3. In August 1988, the district court held that appellants were continuing to operate "an unlawful, dual system of public higher education in violation of Title VI." J.S. App. 4a. The court found that the State, through the supervision of appellant Board of Regents and each of the other appellants, operates 20 institutions. Four institutions "that were originally established as 'black schools' [including Southern] * * * remain predominantly black"; the eleven institutions "that were originally established as 'white schools' * * * remain predominantly, and disproportionately, white." *Id.* at 5a, 6a. The court noted that the other four schools "are all predominantly, and disproportionately, white." *Id.* at 6a. The court also found that "[t]he four board[s] governing these twenty schools suffer from similar racial identifiability. The Southern Board remains over three-fourths black, while the other three boards are between 70% and 80% white." *Id.* at 9a. Thus, the court fully accepted appellant Board of Regents' concession that "the racial identifiability of Louisiana's public colleges and universities persists today is . . . undisputed." *Ibid.*

Turning to the merits of the controversy, the district court determined that "[i]n failing to achieve a truly unitary system at the higher level of public education, the State continues to provide polarization and separation on

a racial basis." J.S. App. 33a.[12] The court acknowledged the State's interest in fostering "freedom of choice," but concluded that

> [a]lthough the State has the authority, and should be encouraged, to promote different and unique types of higher learning institutions, the State fails when it fosters two universities or colleges in close geographic proximity offering overlapping courses and programs—especially where one is predominantly black and one is predominantly white.

Id. at 34a.

4. In December 1988, the district court appointed a special master, under Fed. R. Civ. P. 53, and charged him with the responsibility "to review the proposed [remedial] plans submitted by the parties and to conduct hearings regarding the viability of the proposed plans, and any other appropriate remedial measures." J.S. App. 626a-627a; see also *id.* at 577a-578a, 579a-581a.

In May 1989, after holding hearings and receiving submissions from the parties, the special master issued his final report. See J.S. App. 623a-715a. That report recommended detailed and comprehensive measures to overhaul the State's higher education system, including: (1) abolishing the State's current four-board structure and replacing it with a single governing board responsible for implementing and overseeing specific changes in the school system (*id.* at 652a-665a); (2) creating "campus-based advisory committees [to] help * * * maintain channels of communication between institution and board"

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[12] The court also stated that the consent decree's increased funding could not desegregate the system because that funding would neither eliminate the duplication of course offerings between proximate white and black schools, nor attract white students to the historically black schools. J.S. App. 34a-35a.

(*id.* at 665a); (3) classifying institutions ("tiering") and implementing selective admissions standards – as opposed to the then statewide policy of open admissions (*id.* at 667a-680a);[13] (4) implementing a "community college system" (*id.* at 680a-688a); (5) reducing instances of "program duplication" among schools (*id.* at 689a-691a); (6) and taking steps to desegregate LSU Law Center (short of merger with the predominantly black Southern Law Center), such as offering substantial scholarships to black students, undertaking "vigorous recruitment efforts," and setting a "10 percent category of admissions exceptions [for minority applicants]" (*id.* at 692a, 693a).

5. In July 1989, after receiving comments and objections from the parties, the district court issued an order generally accepting the special master's report and recommendations. See J.S. App. 39a-77a. With respect to the State's current four-board structure, the district court observed that "[g]iven the racially identifiable membership of the Board, none, including the Southern board which vigorously seeks to preserve its separate identity, is an exponent of racial integration." *Id.* at 44a. It then found that "[t]he present scheme for governing education in Louisiana – three operating boards and one coordinating board – has perpetuated illegal segregation in Louisiana's higher education, even though the system's creation postdates the filing of this case." *Id.* at 45a. The court therefore concluded that "[t]he system of multiple boards is * * * a defect in the state's system of higher education that violates the federal constitution." *Ibid.* Accordingly,

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[13] The report recommended establishing three separate "tiers" of schools – a flagship school (LSU), doctoral institutions (including Southern University), and comprehensive institutions (including Grambling) – with the new governing board to adopt more select admissions criteria appropriate to each "tier." See J.S. App. 667a-680a.

the court ordered that "the four boards currently governing public higher education in Louisiana shall be disbanded [within 30 days] and their powers consolidated into a single state governing board." *Id.* at 63a.[14]

Turning to problem of the effects of racial segregation on legal education in Louisiana, the district court found that "as long as the two institutions of disparate quality exist"—Southern Law Center and LSU Law Center—"the State will continue to produce a secondary class of lawyers unable to compete fully in the professional context." J.S. App. 61a. The court further found that "[g]iven the racial composition of the two schools, the negative impact of this disparity will fall largely upon the black law student population, and given the consent decree experience, a simple provision of funds will not resolve this problem, even assuming such funding is a realistic possibility."

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[14] The new board would consist of 17 voting members (and one non-voting student member); the voting members would be appointed by the Governor and confirmed by the Louisiana Senate. J.S. App. 64a-65a. In addition, the board would have "the special mission of monitoring and implementing [the court's remedial order] and of insuring that progress toward eliminating Louisiana's racially dual education system is achieved." *Id.* at 63a.

The district court, agreeing with other recommendations filed by the special master, specifically charged the new board with a variety of tasks within certain deadlines, including: developing and implementing procedures for the use of advisory committees at each school (J.S. App. 66a); implementing a scheme for classifying each school with regard to programs and admissions standards (*id.* at 66a-68a); developing selective admission requirements to replace the "traditional system of open admissions to all state universities" (*id.* at 68a); drafting a comprehensive plan for a community college system (*id.* at 70a-71a); and implementing "a system of enrollment management, program review and program transfer to address the problem of program duplication and accompanying waste of resources and segregation" (*id.* at 71a).

Ibid.[15] Accordingly, the district court did not accept the special master's recommendation to defer a merger of the two schools. Instead, the court directed the newly created board, over the next five years, to "develop a plan for merger of the two schools * * * [that] will minimize the necessary adjustment by the students, administration, and faculty and the impact of curriculum change." *Ibid.*[16]

6. On August 4, 1989, after modifiying its remedial order in certain respects, see J.S. App. 81a-99a, the district court denied motions to stay its order, see *id.* at 78a-80a.[17] On August 18, this Court stayed the district court's order pending the timely docketing and disposition of appeals then filed by the Southern Board (No. 89-557)

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[15] As the court observed, "Southern Law Center is desegregated, with a student body of 58 percent black and 42 percent white and a faculty (including part-time) which is virtually 50/50." J.S. App. 60a. LSU Law Center, on the other hand, "had a minuscule percentage of black students. During the period of the consent decree, it ranged from 1.9 percent to 0.8 percent. In 1988, it was only three percent." *Ibid.*

[16] The court also ordered the board, by the 1990-1991 school year, to "begin implementing the merger of Southern Law Center into the LSU Law Center," and specifically directed the LSU Law Center to "undertake as soon as practicable, but no later than the 1990-1991 school year, vigorous efforts for recruiting blacks, including ten percent admissions exceptions for black students, offering scholarships to prospective black students and appointing a special admissions officer for black students * * *." J.S. App. 72a, 73a.

[17] At this point in the litigation, the State began to speak with two voices. Although the State's Attorney General sought a stay of the district court's orders, the Governor of Louisiana also filed a brief with the district court. The Governor, on behalf of the State of Louisiana, opposed the motion to stay. See J.S. App. 81a n.2. The dispute over the State's legal representation continues before this Court. See note 5, *supra*.

and the Attorney General on behalf of the State (No. 89-556). *Id.* at 2a.[18]

ARGUMENT

These separately docketed appeals bring before this Court the federal government's longstanding challenge to the State of Louisiana's failure to eliminate the lasting effects of its racially segregated system of higher public education. In our view, however, the action filed by the United States in 1974 did not require the convening of a three-judge district court under 28 U.S.C. 2281 (1970) (repealed 1976). As a result, the Court at this time lacks appellate jurisdiction under 28 U.S.C. 1253 and the appeals must be dismissed. *E.g., Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975).[19]

1. Appellants each invoke this Court's jurisdiction under 28 U.S.C. 1253. *E.g.*, Att'y Gen. J.S. 2-4; Southern J.S. 2; Gov. J.S. 2-4, 8-16; see note 2, *supra*. The Court has appellate jurisdiction over this appeal under Section 1253 only if the action filed by the United States required the convening of a three-judge court under 28 U.S.C. 2281 (see note 3, *supra*). *E.g., Weinberger* v. *Salfi*, 422 U.S. at 763 n.8; see *Norton* v. *Mathews*, 427 U.S. 524, 531 (1976). In its complaint, the United States alleged that, "[a]cting pursuant to Louisiana law and usage," appellants "have established and perpetuated dualism based upon race in the operation of state institutions of higher education by

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[18] On September 29, 1989, the Governor of Louisiana, also on behalf of the State, filed a separate notice of appeal in No. 89-771. See J.S. App. 210a-212a.

[19] Because resolution of the jurisdictional issue will determine the forum in which litigation of this case will proceed, and in light of the importance of an expeditious decision on the merits of the underlying controversy, we urge the Court not to postpone ruling on that issue.

constructing and maintaining institutions of higher learning designed to serve students of a particular race." J.S. App. 159a. The complaint further alleged that the institutions maintained explicitly racial admissions policies before 1953. *Id.* at 160a-161a. Thereafter, the complaint charged, "[t]he acts and practices of [appellants] * * * maintain[ed] and perpetuate[d] an unlawful dual system of higher education based upon race," *id.* at 162a, and appellants "failed in their affirmative duty * * * to eliminate the vestiges of the dual system," *ibid.*

As relief, the complaint sought an order enjoining appellants from maintaining their segregated system and an order requiring them "to develop, submit and implement detailed plans which promise realistically and promptly to eliminate all vestiges of a dual system of higher education existing within the State of Louisiana." J.S. App. 163a. Since the complaint raised a substantial constitutional challenge to the State's practice and policy and sought widespread injunctive relief, the United States requested (and received) a three-judge court under Section 2281, as then construed by the Fifth Circuit in *Sands* v. *Wainwright*, 491 F.2d 417, 421-423 (1973) (en banc), cert. denied, 416 U.S. 992 (1974). See J.S. App. 185a-196a. This Court's intervening decisions in *Morales* v. *Turman*, 430 U.S. 322 (1977), and *Costello* v. *Wainwright*, 430 U.S. 325 (1977), however, rejected the *Sands* court's construction of Section 2281, and thus establish that the action filed by the United States did not require the convening of a three-judge court. Accordingly, the Court at this time lacks jurisdiction over these appeals under 28 U.S.C. 1253.[20]

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[20] None of the parties, including the United States, ever requested the district court to reconsider the propriety of convening a three-judge panel, although alerted to that issue by Chief Judge Brown's

In *Morales* v. *Turman, supra*, plaintiffs raised constitutional challenges to a state agency's practices concerning the custodial supervision of juveniles. In ordering the convening of a three-judge court under Section 2281, the Fifth Circuit concluded that Congress had not drawn a distinction between challenges to state "regulations" as opposed to challenges to state "practices." *Morales* v. *Turman*, 535 F.2d 864, 872 (1976). This Court, however, rejected that conclusion, expressly holding that a challenge to statewide practices did not call for the convening of a three-judge court under Section 2281:

> In construing § 2281, this Court has concluded that the three-judge court procedure is brought into play in any "suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.' " *Phillips* v. *United States*, 312 U.S. 246, 251 (1941). We have never, however, considered the generalized, unwritten practices of administration to be equivalent to the "delegated legislation" of an administrative board.

430 U.S. at 323. And in *Costello* v. *Wainwright, supra*, this Court made clear that "the applicability of § 2281 as written turns on whether a state statute is alleged to be unconstitutional, not on whether an equitable remedy for unconstitutional state administrative behavior ultimately impinges on duties imposed under concededly constitutional state statutes." 430 U.S. at 326.

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initial order. See J.S. App. 197a-198a. Nor did the district court address the issue, other than in a brief statement in its 1988 liability opinion. See *id.* at 10a ("Plaintiff having properly requested a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284, a three-judge court was convened.").

By its terms, the complaint here alleged that appellants had maintained segregated public colleges, in violation of Title VI and the Fourteenth Amendment, and sought an injunction against various acts, practices, and derelictions in duty on the part of appellants that had perpetuated the racially segregated school system. See J.S. App. 153a-165a. But as this Court made plain in *Morales* v. *Turman*, 430 U.S. at 323-324, a constitutional challenge to a state actor's practice is not equivalent to the type of action seeking to enjoin implementation (or enforcement) of an allegedly unconstitutional state statute that calls for a three-judge court under Section 2281. Unless the former lawsuit specifically seeks to enjoin operation of state law, the Court explained, it does not meet the threshold requirements of jurisdiction under Section 2281. See *Morales*, 430 U.S. at 322-323.

To be sure, the district court did enjoin the continued existence of the State's four-board structure—a system created by Louisiana state law—on the ground that this structure had facilitated the perpetuation of illegal separation. See J.S. App. 63a; see pp. 11-12, *supra*. However, no party to this action ever alleged that the statutory scheme creating the governing boards was unconstitutional and the district court itself did not suggest that the state laws creating that structure were enacted (or maintained) for racially discriminatory purposes.[21] Accordingly, since the

[21] Although the complaint set forth the Louisiana state statutes that had originally required explicit racial segregation on each of the State's college campuses (see J.S. App. 159a-162a), the complaint, by its terms, did not seek to enjoin those laws. Indeed, the State conceded that it had long abandoned implementation of those statutes. See *id.* at 4a-5a. In any event, a constitutional challenge to those laws would not have supported the convening of a three-judge court under Section 2281. Patently unconstitutional statutes do not present substantial constitutional issues requiring a three-judge panel. See, *e.g.*, *Goosby*

complaint here, like those in *Morales* and *Costello*, challenged state officials' illegal practices taken within their authority under state law, and since the only state laws affected by the district court's remedial orders were not specifically challenged in this action, the convening of a three-judge court was unwarranted.

2. The State seeks to avoid *Morales*' holding by claiming that "[t]his case, unlike *Morales*, does not involve challenged, unwritten practices of administration. * * * Here state officials have acted under written authority, both statutory and constitutional." Gov. J.S. 15 (internal quotation marks and citation omitted). But no party in *Morales* contended that state officials were operating the state facility without statutory authorization; rather, plaintiffs there, as here, alleged that state officials were exercising their authority in an unconstitutional manner. See *Morales*, 430 U.S. at 322-323.[22]

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v. *Osser*, 409 U.S. 512, 518 (1973); *Bailey* v. *Patterson*, 369 U.S. 31, 33-34 (1962).

[22] An attempt to distinguish *Costello* is similarly ill-fated. As we have stated, see pp. 14-15, *supra*, and contrary to the State's assertion, the complaint here plainly did not "alleg[e] that the implementation of Louisiana statutes and sections of the Louisiana Constitution violated Title VI and the Fourteenth Amendment." Gov. J.S. 16.

The State also claims (Gov. J.S. 13-14) that the district court's remedial orders' possible effect on officials' actions mandated by state statute required the convening of a three-judge court. That claim is meritless. In *Costello*, this Court expressly held that "[t]he applicability of § 2281 * * * [does not] turn[] * * * on whether an equitable remedy for unconstitutional state administrative behavior ultimately impinges on duties imposed under concededly constitutional state statutes." 430 U.S. at 326. Indeed, the State would have the Court now ignore the very pitfalls of that approach identified in *Costello*. As the Court there explained, "[t]o hold otherwise would require the postponing of the threshold question of jurisdiction until the merits of the controversy had been fully resolved and the broad outlines of

In any event, the State's submission, if accepted, would vitiate the holdings in both *Morales* and *Costello*, and would have rendered the convening of a three-judge court under Section 2281 a routine, rather than an extraordinary, event. State officials can only take state action when they act under color of some state law. Congress assuredly did not intend such a commonplace factor, capable of being alleged in every action brought against state officials, to satisfy the requirements for convening a three-judge court under Section 2281. In sum, under the circumstances presented, this Court lacks jurisdiction over each of the appeals under 28 U.S.C. 1253 and should dismiss those appeals for want of jurisdiction.

In recognition of the jurisdictional obstacle, the State, in filings by both the Governor and the Attorney General, has filed separate notices of appeal to the Fifth Circuit. Southern has filed its own notice of appeal to that court, as has the United States. See 89-771 J.S. App. 209a.[21] Sound judicial administrative practices further confirm that appellate review over this case should proceed first in the court of appeals. Courts of appeals have considered and decided cases raising similar issues in the context of challenges to state higher education systems. See *United States* v. *Alabama*, 828 F.2d 1532 (11th Cir. 1987), cert. denied, 108 S. Ct. 2857 (1988); *Geier* v. *University of Tennessee*, 597 F.2d 1056 (6th Cir.), cert. denied, 444 U.S. 886 (1979). Indeed, the Fifth Circuit is currently reviewing the federal government's appeal from a district court's judgment that the State of Mississippi had complied with its affirmative duty under Title VI to dismantle a segregated

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equitable relief discerned. Section 2281 embodies no such wasteful and uncertain mandate." *Ibid.*

[21] We will challenge the district court's order requiring the merger of the Southern and LSU Law Centers.

higher education system. See *Ayers* v. *Allain*, 674 F. Supp. 1523 (N.D. Miss. 1987), appeal pending, No. 88-4103 (5th Cir.) (argued May 1, 1989).

CONCLUSION

The appeals should be dismissed for lack of jurisdiction under 28 U.S.C. 1253.

Respectfully submitted.

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Nos. 89-556, 89-557 and 89-771

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF LOUISIANA, *ex rel.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,
Appellant,

STATE OF LOUISIANA, *ex rel.* CHARLES E. "BUDDY" ROEMER, III, GOVERNOR OF THE STATE OF LOUISIANA, *et al.*,
Appellants,

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from a Three-Judge United States District Court for the Eastern District of Louisiana

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RESPONSE TO MOTION OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

Nos. 89-556, 89-557 and 89-771

STATE OF LOUISIANA, *ex rel.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA,
Appellant,

STATE OF LOUISIANA, *ex rel.* CHARLES E. "BUDDY" ROEMER, III, GOVERNOR OF THE STATE OF LOUISIANA, *et al.*,
Appellants,

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from a Three-Judge United States District Court for the Eastern District of Louisiana

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RESPONSE TO MOTION OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Respondent, the State of Louisiana ("State"), through its Governor, Charles E. "Buddy" Roemer, III, respectfully asks this Court to deny in part the Motion of the NAACP Legal Defense and Education Fund, Inc. for Leave to File Brief as *Amicus Curiae* Urging Dismissal

of Appeal, filed on December 8, 1989 ("LDF Motion and Brief").

The State consented to the filing by the NAACP Legal Defense and Education Fund, Inc. ("LDF") of a brief which dealt with the issue of whether this Court has jurisdiction to hear this case on direct appeal. LDF, however, has not limited its brief to the question of jurisdiction. Instead, LDF has gone beyond the issue to which consent was given by asking this Court "to exercise its authority under the All Writs Act, 28 U.S.C. § 1651, to maintain its stay of the district court's order during the pending of the appellate proceedings." LDF Motion and Brief at 28-29.

Moreover, Rule 44.4 of the Supreme Court Rules provides in part that "[a]n application for a stay or injunction to a Justice of this Court shall not be entertained, except in the most extraordinary circumstances, unless application for the relief sought first has been made to the appropriate court or courts below, or to a judge or judges thereof."

If this Court dismisses the appeal in the instant case for lack of jurisdiction, then the decision of the three-judge district court will be heard on appeal by the United States Court of Appeals for the Fifth Circuit. The court of appeals, however, has not been presented with an application for a stay of the district court's orders. *Cf. Dolman v. United States*, 439 U.S. 1395 (1978) (stay application denied under predecessor to Rule 44 because applicants failed to request stay from court of appeals). Additionally, applicants for the stay in the instant case have failed even to claim "most extraordinary circumstances."

Furthermore, LDF has strenuously argued that the Fifth Circuit's viewpoint is of the utmost importance in helping this Court reach a decision. *See* LDF Motion and Brief at 5 ("direct review from the district court's ap-

proval of the Special Master's report . . . would be imprudent and likely to impair this Court's ability fully to consider and resolve the weighty issues [involved]"). LDF, however, has failed to recognize that this same logic applies with equal force in regard to an application for a stay. LDF's own argument inescapably leads to the conclusion that in the instant case an application for a stay first should be filed with the court of appeals so this Court can benefit from its viewpoint.

For these reasons, the State requests this Court to deny that part of the LDF Motion and Brief asking the Court to maintain the current stay.

Respectfully submitted,

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Appellant

v.

UNITED STATES OF AMERICA

STATE OF LOUISIANA *ex rel.* CHARLES E. "BUDDY" ROEMER, III, *et al.*,
Appellant

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court for the Eastern District of Louisiana

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RESPONSE TO MOTION TO DISMISS

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Nos. 89-556, 89-557, and 89-771

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF LOUISIANA, EX REL. WILLIAM J. GUSTE, JU., ET AL., APPELLANT

v.

UNITED STATES OF AMERICA

BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND AGRICULTRUAL AND MECHANICAL COLLEGE, APPELLANT

v.

UNITED STATES OF AMERICA

STATE OF LOUISIANA EX REL. CHARLES E. "BUDDY" ROEMER, III, ET AL., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

RESPONSE TO MOTION TO DISMISS

QUESTION PRESENTED

The question as presented by the United States is deemed adequate for purposes herein.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-556

STATE OF LOUISIANA, EX REL. WILLIAM J. GUSTE, JR., ET AL.,
APPELLANT

v.

UNITED STATES OF AMERICA

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BOARD OF SUPERVISORS OF SOUTHERN UNIVERSITY AND
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v.

UNITED STATES OF AMERICA

89-771

STATE OF LOUISIANA EX REL. CHARLES E. "BUDDY" ROEMER, III,
ET AL., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

RESPONSE TO MOTION TO DISMISS

NOW COMES the GRAMBLING STATE UNIVERSITY ALUMNI ASSOCIATION, through its counsel, THOMAS N. TODD, and hereby states that it joins the MOTION TO DISMISS the appeals in 89-556, 89-557 and 89-771, filed by the United States, December 1989, for the reasons stated therein.

Further, that for the purpose of this motion, the Statement, Argument and Conclusion of the United States are also adopted.

Respectfully submitted,

/S/
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UNIVERSITY ALUMNI ASSOCIATION

December 1989